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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 612

CLARESA F. ARMSTRONG BROWN,
Petitioner,

vs.

COMMERCIAL NATIONAL BANK OF PEORIA,
AS TRUSTEE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

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COMMERCIAL NATIONAL BANK OF PEORIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois in the above entitled case entered on 17 July, 1969.

CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court of Illinois is reported in 42 Ill. 2d 365 and is printed in the appendix hereto at A1. The opinion of the appellate court appears in 94 Ill. App. 2d 273.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

The question presented was raised in the Illinois Supreme Court at the earliest possible time, to wit, in the petition for reconsideration of its order denying petitioner's motion for a rehearing, as more fully appears from the *Statement of the Case* herein. In any event, the question was passed on by the Illinois Supreme Court when it denied petitioner's motion on 17 July, 1969, as will also appear more fully from the *Statement of the Case* herein.

QUESTION PRESENTED FOR REVIEW.

Whether petitioner was denied due process of law when three justices of a state supreme court held undisclosed corporate offices that gave them an interest in the outcome of this case, and the state court established a novel rule of law that would promote the interests of the justices' corporations?

CONSTITUTIONAL PROVISION INVOLVED.

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ." *Amendment Fourteen, §1, of the Constitution of the United States.*

STATEMENT OF THE CASE.

This was an action brought to set aside three irrevocable trusts secured by a bank from a senile 85 year old woman who did not understand the trusts, had no competent independent adviser, and entered into the transaction entirely at the instance of the bank, which admitted having a prior fiduciary relation toward her. (App. A14, A21-2, A22-26, A9-10, A13-14) The theory of the case was that, under such circumstances, the bank breached its fiduciary obligation to her. The court laid down the doctrine, never before suggested by any court of last resort, that the bank was exempt from its fiduciary obligations because its only gain was its fees.* (App. A4-5)

The opinion of the court was written by a justice who, as a director and stockholder of a bank, had an obligation to promote the interests of his bank, and thus had an interest in promulgating a rule of law favorable to banks. Two other justices of the court, as directors and stockholders of banks, had the same conflicting interests. The overreaching by the bank, sanctioned by the court's opinion, is detailed in the Petition for Rehearing. (App. A9)

The fact of the justices' directorships was not disclosed to the petitioner or her counsel and they had no knowledge of it until after rehearing was denied on 27 May, 1969. (App. A32-33) It became known to them only through the following circumstances:

On 10 June, 1969, a document was filed in another case in the Supreme Court of Illinois charging that the justice who wrote the opinion in that case had accepted from a litigant a gift of bank stock worth $2,000. (App. A32) On

* Under the terms of the trusts, the bank was permitted to fix its own fees. On the basis of its fees already charged these would amount to something over $200,000 in the years that the trusts would endure. (App. A10)

12 June, 1969, the House of Representatives of the State of Illinois adopted a resolution to investigate these charges and on 17 June, 1969 the Supreme Court of Illinois appointed a commission to investigate them.* (App. A32)

Through these investigations, petitioner learned for the first time that three justices of the Supreme Court of Illinois were, at the date of the opinion, directors and stockholders of banks. (App. A32-33) On 8 July, 1969, petitioner presented her motion, affidavit and memorandum of authorities to a justice of the Supreme Court of Illinois setting out these facts. (App. A30-36) Petitioner alleged that under these circumstances, in the light of prior decisions of this Court, the opinion herein denied petitioner due process of law as guaranteed to her by the 14th Amendment. (App. A30, 34-36) On that sole ground, petitioner moved the court to reconsider its order denying her petition for rehearing. The justice of the Supreme Court of Illinois, to whom this motion was presented, referred it, by an order, to the full court for disposition. (App. A37) Briefs were filed by both sides and on 17 July, 1969, that court considered and denied petitioner's motion. (App. A38) At the same time, on Petitioner's motion, the court recalled and stayed its mandate pending the disposition by this Court of this petition for certiorari. (App. A38)

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* Ultimately, on 31 July, 1969, the commission appointed by the Supreme Court of Illinois reported to the court that two justices of that court had been guilty of judicial impropriety in accepting gifts of bank stock from a litigant and should resign, which they promptly did. One of them was the justice who wrote the opinion in this case. (See certified copy of Report of Commission filed with Record herein.)

REASONS FOR GRANTING THE WRIT.

1. The decision below conflicts with the principles announced in other judicial conflict-of-interest cases decided by this Court.

At the last term, this Court on certiorari reversed a court of appeals and a district court in a civil conflict-of-interest case where the alleged potential bias was less evident than in the case at bar. (*Commonwealth Coating Corp.* v. *Continental Casualty Co.*, 393 U. S. 145.) Both lower courts had confirmed a unanimous arbitration award, against the charge (discovered only after the award) that the third arbitrator had, more than a year prior to his appointment, occasionally been employed and paid as a consultant by one of the litigants. This Court said:

> "We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge . . . in the case of courts this is a *constitutional* principle [the Court's italics] . . . any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias." (pp. 148, 150)

In a recent case, this Court issued a writ of certiorari to a state court and reversed its judgment on the ground that the judge's possible emotional interest in the decision, as the instigator of the case, made it a violation of due process of law for him to sit in judgment on the case. (*In re Murchison*, 1955, 349 U. S. 133.) We do not suggest an analogy on the facts, but the principles announced by the Court at that time are clearly applicable to this case:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of

law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio,* 273 U. S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " (p. 136.)

The *Tumey* case, to which this Court referred in *Murchison* had unanimously held that the likely desire of a village Mayor to improve the financial condition of his village by the fines he imposed as a judge deprived the litigants before him of due process of law. The indirect financial interest in *Tumey* is more closely analogous to the facts in the case at bar. This Court said in *Tumey*: "With his interest as mayor in the financial condition of his village and his responsibility therefor, might not a defendant with reason say that he feared that he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village." 273 U. S. at 533.

The Court of Appeals for the 9th Circuit recognized these principles in *In re Honolulu Consolidated Oil Co.,* 1917, 243 Fed. 348, when it invoked the extraordinary remedy of mandamus to compel a district court judge to disqualify himself where he had no direct interest in the case then at bar but owned stock in another corporation that might be involved in similar litigation.

2. The question presented is one of widespread effect and of fundamental importance to the administration of justice in the state and federal courts of this country.

The questions presented here have national scope. In several states, judges of state and federal courts are directors and stockholders of banks. Public records in the office of the Federal Deposit Insurance Corporation reveal that certain judges are directors and stockholders of banks in Connecticut, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, South Carolina, Virginia, Louisiana and Illinois. Two of the three judges of the Illinois appellate court that passed upon the case at bar were directors and stockholders of banks and one of them was the chairman of the board of a bank.

The potential conflicts of interest resulting from such directorships have been recognized by agencies of both the national and state governments. In 1963, the Judicial Conference of the United States passed a resolution that no federal judge "shall serve in the capacity of an officer, director, or employee of a corporation organized for profit." (Reports of the Proceedings of the Judicial Conference of the United States for 1963, p. 62.) The Judicial Conference did not provide, as it could not provide, sanctions to make this admonition effective. In the light of the problem of separation of powers, there is a question whether any means for policing such a rule exists except through decisions of the courts. (See Hearings before the Subcommittee on Separation of Powers, of the Senate Committee on the Judiciary, July 14-16, 1969.)

In 1967, the Illinois legislature enacted a statute forbidding any judge to serve "as an officer or director of any business corporation or other for profit corporation." (Illinois Rev. Stat. 1967, Ch. 37, § 160.11.) This Act is not to take effect until 1 January, 1971 and, in any event, con-

tains no penalty for violation. Exhaustive research does not disclose that such a law has been passed in any other state.

The hazards of judges serving as bank directors is increased by the explosion in the growth of bank trusts in the past decade. In 1958 assets held in trust by United States banks amounted to 49.7 billion dollars. At the end of 1967 this figure had reached 250 billion. (COMMERCIAL BANKS AND THEIR TRUST ACTIVITIES: EMERGING INFLUENCE ON THE AMERICAN ECONOMY, 1968, United States House Committee on Banking and Currency, pp. 1, 802.) The devolution of property from one generation to another is passing out of the probate courts and into bank trusts. From these developments it is fair to assume that much litigation will hereafter arise throughout the country involving bank trusts. It is important that this Court settle the question of the qualification or disqualification in such cases of judges who are also directors and stockholders of banks.

CONCLUSION.

Public confidence in the courts has been shattered by the events of the past year. The bench and the bar must strive to restore that confidence. No better opportunity to perform that service will occur than exists in the case at bar.

Petitioner respectfully requests this Court to issue its writ of certiorari to review the judgment of the court below in order to reverse it and remand the case for disposition by an unbiased court.

Respectfully submitted,

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INDEX OF APPENDIX.

PAGE

APPENDIX A

Opinion of the Supreme Court of Illinois, filed March 10, 1969 ..... A1

APPENDIX B

Petition for Rehearing, filed April 17, 1969..... A7

Order of the Supreme Court of Illinois, filed May 27, 1969, denying the Petition for Rehearing A29

APPENDIX C

Motion to reconsider the Order denying Petition for Rehearing and to recall the mandate, Affidavit of Willard L. King and Memorandum of Authorities in support thereof, filed July 8, 1967 ..... A30

Order of Illinois Supreme Court Justice Daniel P. Ward, dated July 8, 1969..... A37

Order of the Supreme Court of Illinois, dated July 17, 1969, denying the portion of the Motion seeking a reconsideration and allowing the portion seeking to recall and stay the mandate pending disposition of petition for writ of certiorari in the Supreme Court of the United States..... A38

APPENDIX A.

Docket No. 41515—Agenda 32—January, 1969.

CLARESA F. ARMSTRONG BROWN, Appellant *vs.* COMMERCIAL NATIONAL BANK OF PEORIA, *et al.*, Appellees.

MR. JUSTICE KLINGBIEL delivered the opinion of the court:

The Commercial National Bank of Peoria, as trustee, filed a complaint in the circuit court of Peoria County seeking approval of its accounts and investment policy with respect to two irrevocable trusts established in 1962 by Clara K. Meyer, since deceased. A counterclaim was filed by her daughter, Claresa Armstrong Brown, the principal beneficiary under one of the trusts. The counterclaim seeks to set aside both trusts together with a third one made in 1960, on the ground of undue influence on the part of the bank. After extensive hearings a decree was entered dismissing the counterclaim and approving the trustee's reports. The decree was affirmed by the appellate court (94 Ill. App. 2d 373), and we have allowed the daughter's petition for leave to appeal from the appellate court's judgment. The sole question is whether the circuit court erred in refusing to set aside the trusts.

The settlor, 85 years of age when the 1962 trusts were set up, had been divorced from her husband in 1933 and never remarried. She had two children: Richard, born in 1909, and Claresa, the appellant, born in 1916. Richard had four children, while Claresa had none. The 1960 trust was set up primarily for the settlor's grandchildren, and the two

1962 trusts were created for Richard and Claresa respectively. Under Richard's trust he was to receive the income for life, with the corpus to be distributed on his death to his descendants. Claresa's trust provided for one-half the income to be paid to her, and the remaining half to be paid her in the trustee's discretion, should she require it, with a power of appointment in her over any portions of the income accumulated. The corpus was payable after her death to her children if any and if none then to Richard's children. The trust also provided for a lump sum payment of $50,000 as Claresa should desire, and this sum in fact was paid to her shortly thereafter when she purchased a co-operative apartment in Chicago, where she resided.

The evidence shows the settlor to have been a capable woman in the management of business affairs, having long experience in dealing with her stocks and other investments. She was an active director of the Central National Bank until its consolidation with the appellee bank in 1961. For many years her legal matters were handled by Attorney John Elliott, who was paid an annual retainer. In 1959 she discussed with Frank Mayne, vice-president of the bank, the question of making gifts in trust and she told him she wanted to create a trust for her grandchildren. Several conferences followed in which her attorney Elliott participated, and on January 7, 1960, the trust was executed by the settlor in the presence of both Elliott and Mayne.

In the summer of 1961 the settlor discussed with Mayne the matter of gifts in trust to her son and daughter, and several alternative plans were prepared by the bank. At that time she decided to employ Attorney Boyd Goldsworthy who had long known the son Richard and had done legal work for him through the years to draw the trusts.

The documents were completed by November and sent to the settlor to study them. She gave them to both Claresa and Richard to examine and discuss, and on January 15, 1962, some six months after they were first discussed, the settlor signed them, in the presence of Mayne and Goldsworthy. The settlor died February 19, 1964, of arteriosclerosis. The appellant had received benefits from her trust for some two years after it was created but in April of 1963 began to question the bank's investment policy. Her demands for a change of investments became so insistent that on November 20, 1964, the bank filed its complaint herein to have its actions confirmed.

In support of her counterclaim to have the trusts set aside the appellant argues that a fiduciary relationship existed between the bank and the settlor, that the latter was in a senile condition and did not understand the trusts, and that the bank "secured" the trusts through a presumed exercise of undue influence. It is asserted that the settlor did not have independent advice in private, and the proposition is advanced that in order to avoid a finding of undue influence under the present circumstances it must be shown that the donor privately consulted a competent, independent adviser.

We are aware of no rule of law which deems the transfer fraudulent whenever there has been no private consultation with an independent adviser. Whether the settlor had independent legal advice is merely one of several factors which may be important in determining the fairness of a transfer. The correct rule, where a fiduciary relationship exists, is that a transfer will be deemed presumptively fraudulent when the dominant party has profited at the expense of the dependent party. (*Boryca* v. *Parry,* 24 Ill. 2d

320.) In such cases the fiduciary has the burden of proving the transaction was fair and did not proceed from undue influence. (*Turner* v. *Black,* 19 Ill. 2d 296.) And as we have heretofore pointed out "Important factors in determining whether a particular transaction is fair include a showing by the fiduciary: (1) that he made a free and frank disclosure of all the relevant information he had; (2) that the consideration was adequate; and, (3) that the principal had competent and independent advice before completing that transaction." *Works* v. *McNeil,* 1 Ill. 2d 47, 52.

In the case at bar it is undisputed that the only gain or benefit to be realized by the trustee is its fee for administering the trust, and the first question that arises is whether this kind of "benefit" is sufficient to give rise to the presumption. The law in this State is that under such circumstances there is no presumption. The mere fact that an attorney or confidential agent who writes the will is named executor and trustee, to be compensated as such, does not alone raise a legal presumption of undue influence. He must receive a substantial benefit as a legatee or beneficiary. (*Turner* v. *Black,* 19 Ill. 2d 296; *Gilbert* v. *Oncale,* 371 Ill. 427.) In *Compher* v. *Browning,* 219 Ill. 429, the confidential agent of an aged testatrix drew her will, or procured it to be drawn, and was made an executor and trustee thereunder. It was held (219 Ill. at 438-439) that the rule under which undue influence is inferred from a confidential relation has no application where the fiduciary takes nothing under the will, but was merely to be compensated for his services as such. He is not to be regarded as taking beneficially within the meaning of the rule but only as accepting duties thereunder. Where the fiduciary is benefited by the transaction he has the burden of showing its fairness, but

if he merely drafts the instruments and is to act as trustee, the presumption does not apply. The party seeking to set aside the instruments must prove by a preponderance of the evidence that it was in fact the result of undue influence. *Williams* v. *Ragland,* 307 Ill. 386.

This the appellant has failed to do. Her claim that the trusts were "procured" by the bank out of self-interest finds no support whatever, nor are the repeated references to the settlor as a "senile donor" substantiated by the evidence. Her physical and mental condition described by some 28 witnesses, including her family physician, social friends, employees and fellow board members of the bank, and others was found adequate to enable her to understand the trusts, and such finding is amply sustained by the testimony. It is not necessary that a person setting up a trust be able to explain every technical term used in the instrument. *Pernod* v. *American Nat. Bank & Trust Co.,* 8 Ill. 2d 16, 21.

Other points which appellant seeks to make are also without merit. Despite counsel's urging to the contrary, there is little evidence from which it could be inferred that the attorney Goldsworthy represented anyone other than the settlor, who was billed for his services and paid the fee. And as the trial court expressly found, there is nothing to show that a conspiracy or plan existed on the part of the son, Goldsworthy and Mayne to cause the dismissal of Elliott as Mrs. Meyer's attorney.

There is no need to unduly extend this opinion by discussing evidence item by item, as the parties have largely done throughout almost 400 pages of brief and argument. It is clear on this record that the basic idea for these trusts

was initiated by the settlor, not by the trustee, and she established them only after deliberation and study over an extended period of time. Moreover there is nothing whatever to indicate she subsequently expressed dissatisfaction with any of them.

The trial court heard the evidence in this case, embodied in over 2000 pages of testimony and several hundred exhibits, and its conclusions were unanimously sustained by the appellate court. It is a well-established rule, too familiar to need citations, that where a case is heard by the chancellor and the evidence is oral, entirely or in part, his decree will not be reversed unless it is against the manifest weight of the evidence, or unless there is clear and palpable error in some other respect. The trial court having heard and observed the witnesses is in a better position than is a court of review to decide what weight should be given their respecive testimony.

The Third District Appellate Court was correct in affirming the decree, and its judgment will be affirmed accordingly.

JUDGMENT AFFIRMED.

APPENDIX B.

No. 41515

IN THE

Supreme Court of Illinois

CLARESA F. ARMSTRONG BROWN, *Defendant, Cross-Complainant, Counterclaimant, Appellant and Cross-Appellee,* *vs.* **COMMERCIAL NATIONAL BANK OF PEORIA, a National Banking Association, as Trustee, etc., et al.,** *Plaintiff, Cross-Defendants, Appellees and Cross-Appellants.*	Appeal from the Appellate Court of Illinois, Third District, There Heard on Appeal from the Circuit Court of the 10th Judicial Circuit of Illinois, Peoria County, General Division 11. Honorable **Robert E. Hunt,** Trial Judge Presiding.

PETITION FOR REHEARING.

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SUMMARY.

We suggest that the language of this opinion will, in effect, issue a judicial license to banks in a fiduciary position to secure Irrevocable Trusts from aged persons without affording the donor the protection that the law has always given to such donors. We suggest that this language will arise to plague this Court in future cases.

IN THE

Supreme Court of Illinois

CLARESA F. ARMSTRONG BROWN, *Defendant, Cross-Complainant, Counterclaimant, Appellant and Cross-Appellee,* *vs.* **COMMERCIAL NATIONAL BANK OF PEORIA, a National Banking Association, as Trustee, etc., et al.,** *Plaintiff, Cross-Defendants, Appellees and Cross-Appellants.*	Appeal from the Appellate Court of Illinois, Third District, There Heard on Appeal from the Circuit Court of the 10th Judicial Circuit of Illinois, Peoria County, General Division 11. — Honorable **Robert E. Hunt,** Trial Judge Presiding.

PETITION FOR REHEARING.

Appellant moves for a rehearing and states the points overlooked or misapprehended as follows:

1. The opinion states: (A5-A6) **"It is clear on this record that the basic idea for these trusts was initiated by the settlor, not by the trustee . . ."**

If true, this statement is decisive of this case for the Bank. But not one word in the record supports this statement and the oral and documentary evidence to the contrary is overwhelming. Mayne, the Bank's Vice President, who admitted his fiduciary relation in the most emphatic terms, was asked: "Q. When you came to this *project*

of securing the million dollar Irrevocable Trust of January, 1962 from Mrs. Meyer you knew that it would be necessary for her to have independent legal counsel for that trust to be valid, did you not?" And he answered "A. I did." (Rec. 1009.) The letter addressed to Mayne that Goldsworthy (the attorney whom he had summoned) prepared and had her sign when she executed these trusts starts: "You and Mr. Goldsworthy have discussed with me for some time the advisability of an Irrevocable Trust." (AB Ex. 34, Rec. 234-6, 994-5.) Mayne was asked: "Q. The securing of such an Irrevocable Trust is a very desirable operation for a Bank, is it not?" And he answered "A. Yes." (Rec. 1009.) The Bank advertised to secure such trusts. (AB Ex. 29.) Mayne's first letter to Mrs. Meyer proposing the 1962 Irrevocable Trusts starts: "Several weeks ago *we talked to you* concerning the advisability of a gift in trust for the benefit of Richard and Claresa." (Emphasis supplied.) (AB Ex. 7, Rec. 72, 951.)

2. The opinion states: (p. A4) **"In the case at bar it is undisputed that the only gain or benefit to be realized by the trustee is its fee for administering the trust, and the first question that arises is whether this kind of 'benefit' is sufficient to give rise to the presumption. The law in this State is that under such circumstances there is no presumption."**

We submit that no court of last resort has ever before held a bank which emphatically admitted its fiduciary relation to a donor, as here, to be exempt from the law governing fiduciaries because its only gain was its fees. As we showed in our original brief (p. 23), these fees will amount in this case to something over $200,000 quite apart from the economic power and prestige that the aggregate

of such trusts gives to a bank. (See our original brief, pp. 9-10.) We cited three cases from other jurisdictions where courts have set aside irrevocable trusts to fiduciary banks where the only gain to the bank was its fees. (Our original brief, p. 23.)

We suggest that the language of this opinion will, in effect, issue a judicial license to banks in a fiduciary position to secure Irrevocable Trusts from aged persons without affording the donor the protection that the law has always given to such donors. We suggest that this language will arise to plague this Court in future cases.

The opinion bases this novel rule (p. A4) only on the analogy to the rule that no presumption of invalidity of a will arises when an attorney who draws a will names himself as executor. That rule has existed from the earliest times throughout the United States. Any other rule would raise a presumption against the validity of many, if not most, wills. That rule has never before been extended by analogy in any State to a fiduciary bank securing irrevocable trusts.

There is a vast difference between an executor acting for a short period of two or three years, with his compensation controlled by law and the Probate Court, and a bank as trustee of an irrevocable trust which acts for forty or more years, as in this case, and fixes its own fees.

And this Court has held that the necessary exemption of the lawyer-executor from the fiduciary rule cannot be applied to a lawyer who draws a will and names himself both as executor and as "trustee with large powers". *Gum* v. *Reep,* 1916, 275 Ill. 503, 511.

Suppose a fiduciary lawyer had drawn these Irrevocable

Trusts and named himself as trustee for a period of forty years or more with the broad sweeping powers here given and with the power to fix his own fees as in this case. Would he enjoy the exemption from the fiduciary presumption that the law gives to a lawyer naming himself as executor of a will? Will not this decision invite lawyers in a fiduciary position to name themselves as trustees instead of executors of wills? Would a lawyer be allowed an exemption from the fiduciary rule in naming himself as executor if he were allowed to advertise for executorships as banks advertise for trusts?

This opinion will make a sharp change in the practice of banks in this State. This decision will undoubtedly be widely commented upon by professional journals on Trusts. The larger banks will report it in the monthly brochures on Wills and Trusts that they issue to their customers.

If this decision is allowed to stand, it will relieve banks from their present practice of requiring a donor in an irrevocable trust to have independent legal counsel. The only reason for that practice is to overcome the presumption of invalidity arising from a fiduciary relation. This practice was shown by Mayne's own testimony. (Rec. 1009.)

If this decision is allowed to stand Illinois will be the only State where a fiduciary bank can get a trust where the donor had no independent legal counsel.

This decision will tend to end the drawing of trusts by lawyers. Banks will draw their own trusts without independent legal counsel if no presumption arises from their fiduciary relation because their only gain is their fees.

3. The opinion states: (p. A1) "**The counterclaim seeks**

to set aside both trusts together with a third one made in 1960, on the ground of undue influence on the part of the banks.''

This is wholly wrong. The words ''undue influence'' do not appear in the counterclaim. It charges only breach of fiduciary obligations. (Rec. C254-259.) This mistake runs throughout the opinion, which uses the words ''undue influence'' several times on pp. A1, A3 and A4 of the opinion.

This Court has several times held that the words ''undue influence'' are improper in this context. In *Thomas* v. *Whitney,* 1900, 186 Ill. 225, 230; *Beach* v. *Wilton,* 1910, 244 Ill. 413, 423; *Sharkey* v. *Sisson,* 1923, 310 Ill. 98, 102, this Court quoted with approval from Pomeroy's Equity Jurisprudence: ''Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject than the treatment of actual undue influence and fiduciary relation as though they constituted one and the same doctrine''. In *Clark* v. *Clark,* 1947, 398 Ill. 592, 602, this Court said, ''In cases where the evidence shows a fiduciary relation neither undue influence nor mental incapacity is necessary to be established in order to avoid the transaction.''

The assumption throughout this opinion that appellant's counterclaim charges ''undue influence'' erroneously throws the burden on her to prove it. Actually the burden is entirely on the Bank as a fiduciary to remove all reasonable doubt and suspicion on that score. (See our original brief, p. 11.)

Mayne far surpassed Mrs. Meyer in health, education and business experience. (Rec. 8-10, 918-9.) He admitted that she trusted him and had confidence in him and that he

accepted her trust and confidence. (Rec. 53, 54, 919-920.) He even bought stocks for her without consulting her. (CNB. Ex. 402.) The major portion of her assets were held by the Bank in a 1946 Revocable Trust. (AB Ex. 4.) Mayne admitted that he and the Bank were in a fiduciary relation toward her and were bound to exercise the "utmost good faith" in dealing with her. (Rec. 53-4, 420.)

Under these facts appellant had no duty to prove "undue influence" as this opinion declares. The Bank must remove all reasonable suspicion of it. That it has failed to do.

4. The opinion states: (p. A2) **"The evidence shows the settlor to have been a capable woman in the management of business affairs, having long experience in dealing with her stocks and other investments."**

In view of its past tense we cannot question this statement. However, it ignores the chronology of the case. The testimony of the Bank's own witnesses raised powerful doubts whether this statement was true in 1960 and 1962 when these trusts were executed. She died utterly confused in February, 1964 of arteriosclerosis, a progressive disease which had been diagnosed on her hospital record as early as 1950. (AB Ex. 76.) In 1963 her doctor, the Bank's own witness, stated over his signature on her hospital record: "Patient has been noted to become senile in the past *several years.*" (Emphasis supplied.) (AB Ex. 49.) The Bank's doctor, who signed this statement, testified "Senility is a medical term indicating a condition of the mind as a result of age". (Rec. 1087.) Two other doctors signed this statement. The Bank's own witness, Merritt Meyer, testified that, two weeks before the execution of the 1962 Trusts, his grandmother had been mentally declining in her old age "for some time". (Rec. 575, 578.)

The records of the Bank's own doctor witness confirmed the testimony of appellant, a physician, that her mother started to have small strokes in 1958 which continued until her death. She had a couch put in her kitchen so that she could lie down when she had these strokes. (AB Ex. 72, Rec. 255-6.)

The appellant produced eight large uncashed checks aggregating $1,780.00 payable to her mother's order dated in the ten years before her death which were found scattered among her effects after her death. (AB Ex. 54, A, B, C, D, E, H, I, AB Ex. 15, 100, 120 Rec. 261, 1960-1961.)

In October, 1959 decedent borrowed $12,000 from the Bank at 5% (Rec. 700) with which the Bank let her subscribe for 4% U. S. Bonds, making five officers of the Bank alternate payees. (AB Ex. 25, A, B, C, D, E.) That subscription was completed in the Bank by one of the alternate payees (Rec. 744, 759) and the trial court excluded the documentary evidence of the effort of the Bank's attorney to get these bonds on her death for the alternate payees. The attorney for the Bank sent to each of the alternate payees a copy of his letter to the appellant's attorney demanding these bonds for the alternate payees. (AB Ex. 26.) The alternate payees did not then reject the gift. However, they did reject the gift after the Chairman of the Bank's Board apparently discovered that a Federal statute makes it a crime punishable by one year in the penitentiary and a $5,000 fine for an officer of a bank to accept a gift from the proceeds of a loan. (U. S. C. A. Title 18, Chapter 11, Sec. 220; AB Exs. 26, 27, 28.)

The Bank found it necessary to take over the control of her business affairs including the collection of her rents

and her writing of checks immediately after the execution of the Irrevocable Trusts of 1962. (AB Exs. 58, 61-69, inc.) Her daughter wrote the President and Vice President of the Bank in April, 1962 that her mother was "slipping", but protested that the Bank had stopped her mother from writing small checks for things that she bought and that such check-writing was a form of therapy. (AB Exs. 19, 20, 18, 17.) Her mother had wept because she was not permitted to write *any* checks. (Rec. 1712-13.)

Practically all of the Bank's testimony relates to her condition prior to August, 1961 when she last came to the bank. On the other hand, appellant's witnesses saw her in November, 1961. (See testimony of Mary Hastings Bradley, Rec. 624-633.) By this time her senility was far advanced. Although she had attended the funeral of her son-in-law, Dr. Howard Armstrong, in March of 1961, by November she did not know that he was dead. She had her dinner and a few hours later forgot that she had had it.

There is substantially no conflict in the material evidence in this case. The great bulk of the appellant's evidence was documentary and admissions of the Bank and its witnesses. The sole question here is a legal issue: Upon whom is the burden of proof when a Bank admits in the most emphatic language that it was in a fiduciary relation to a donor from whom it secured a million dollar Irrevocable Trust. If that burden is upon the appellant as this Court holds because the Bank's only gain was its fees, the appellant has clearly failed to sustain that burden. But 66 decisions of this Court have held that the burden is upon the fiduciary to remove all reasonable doubt that the donor understood the transaction and that she had a competent, independent adviser. The Bank has clearly failed to sustain that burden.

5. The opinion states: (p. A1) **"The settlor, . . . had been divorced from her husband in 1933 . . ."**

There is no evidence in the record of any such divorce.

6. The opinion states: (p. A1) **"The 1960 trust was set up primarily for the settlor's grandchildren . . ."**

This is not correct. It is a trust for three of the four children and the after-born children of her son Richard, omitting entirely a child from whom Richard was alienated. (Rec. C261-270.) Mayne testified that Mrs. Meyer said to him: "Mr. Mayne, I love my grandchildren as much as I do my children." (Rec. 1635.) However, this trust deliberately omits a beloved grandchild. (Rec. 1244, 1251.) This omission was one of many factors indicating that Mayne and Richard Meyer collaborated in securing that $750,000 trust from this aged lady. (See our original brief, p. 35.)

7. The opinion states: (p. A2) **"She was an active director of the Central National Bank until its consolidation with the appellee bank in 1961."**

Since she was the largest stockholder in the Central National Bank and the law requires cumulative voting, she could not be excluded as a director of that Bank. She had no activity as a director except to attend meetings and the evidence is that she said very little at directors' meetings. (Rec. 1385, 1395.) She broke down and cried when she was told in December, 1960 that she could not remain a director after the consolidation. (Rec. 275.) The negotiations for the consolidation had been going on for many months prior to December, 1960 and never in the course of those negotiations was she even considered for a possible directorship in the consolidated Bank. (Rec. 1015.)

8. The opinion states: (p. A2) **"In 1959 she discussed with Frank Mayne, vice president of the bank, the question of making gifts in trust and she told him she wanted to create a trust for her grandchildren. Several conferences followed in which her attorney Elliott participated, and on January 7, 1960, the trust was executed by the settlor in the presence of both Elliott and Mayne."**

This is not correct. Mayne testified that one day, she told him that she wanted to make some "gifts" to her grandchildren. (Rec. 1635.) He then suggested the $750,000 Irrevocable Trust. The Record is completely barren of any evidence that she told him "she wanted to create a trust for her grandchildren." Actually he had her sign a trust for three of her four grandchildren.

There is no evidence whatever in the Record that "several conferences followed in which her attorney, Elliott, participated". The trust was drawn by the Bank's Chicago attorneys, Gardner, Carton, on instructions from Mayne. (See our Reply Brief to Bank's Brief, pp. 5-8.) She never had any contact with anyone in that firm, (Rec. 55-6, 833-4, 932, 948). Gardner, Carton apparently told Mayne that the trust would not be valid unless she had independent legal counsel. (See our original Brief, p. 37.) Mayne then called Elliott, the attorney for the Bank, into Elliott's first conference with her on this trust and preserved for the Bank's files Mayne's private, self-serving memorandum of that conference. This was the only conference shown by the record that Elliott ever had with her on the subject. (Rec. 938-9, CNB. Ex. 144.) This memorandum is the only paper in the Bank's files indicating that Elliott had any connection whatever with this trust. It is the only such memorandum in the Bank's files. According to Mayne's memorandum, Elliott

argued against her making a trust with stocks on which she had almost a zero tax base, thus freezing that base. (CNB. Ex. 144.)

9. The opinion states: (p. A2) **"In the summer of 1961 the settlor discussed with Mayne the matter of gifts in trust to her son and daughter, and several alternative plans were prepared by the Bank."**

The Record shows that the alternative plans were prepared by the Bank and discussed with Gardner-Carton before these trusts were discussed with her. (See Chronology in our original Brief, p. 43.) As we have shown (*supra*, pp. A9-10), the documentary evidence is overwhelming that the discussion of these trusts was initiated by the Bank and not by Mrs. Meyer.

10. The opinion states: (p. A2) **"At that time [summer of 1961] she decided to employ Attorney Boyd Goldsworthy, who had long known the son Richard and had done legal work for him through the years, to draw the trust."**

At that time she was paying John M. Elliott a semi-annual retainer as her attorney, as she had been doing for 45 years. (Rec. 270.) The Bank knew that Elliott would advise her against putting these almost zero based stocks into an Irrevocable Trust, thus freezing that base. According to Mayne's private memorandum Elliott had so advised her on the 1960 trust. (Rec. 938-9, CNB. Ex. 144.) For several years her son Richard had been campaigning to have her discharge John M. Elliott as her attorney and employ in his stead Richard's friend, Goldsworthy. (Rec. 273-4, 858-9, 857, 870.) By December 1960 the Bank had decided to "get rid" of John M. Elliott as its attorney. (Rec. 275.) Mayne joined Richard in his campaign to supplant Elliott with

Goldsworthy as her attorney. Early in 1961 Richard, Mayne and Goldsworthy "together planned" for Goldsworthy to get her taxes reduced on her real estate which Richard had managed for her for several years. (Rec. 858-9.) As such manager, Richard employed Goldsworthy to represent his mother for this purpose, but Goldsworthy never had any personal contact with Mrs. Meyer regarding this tax case. (Rec. 213-4, C 364.). Mayne testified for Goldsworthy and Richard on this case before the Board of Review. (Rec. 205.)

In December, 1961 Mayne, at Richard's request, prepared a letter for Mrs. Meyer to copy terminating John M. Elliott's retainer as her attorney. (AB Ex. 2.) When confronted with this letter on deposition, Mayne denied all knowledge of it. (Rec. 64-5 and see Mayne's original deposition in the last volume of the Record.) But the letter was written on Mayne's typewriter and on his water-marked paper and bore Richard's handwriting and Richard was forced to admit that Mayne had prepared it at Richard's request. (Rec. C 721, 870-2.) Richard took Mayne's letter to his mother's hotel room and had her try to copy it. She could not copy it correctly. But this done, Richard marked Mayne's copy "sent December 29" and took her garbled handwritten copy from her and mailed it. (AB Ex. 31, Rec. 870-2.) She wept for a long time after his departure. (Rec. 576.)

We submit that under these circumstances the Bank has not sustained the burden that the law imposes on a fiduciary to remove all reasonable suspicions regarding a transfer of property to a fiduciary by an aged person.

11. The opinion states: (p. A5) ". . . **There is nothing to show that a conspiracy or plan existed on the part of the**

son, Goldsworthy and Mayne to cause the dismissal of Elliott as Mrs. Meyer's attorney.''

This conspiracy or plan between Richard and Mayne is proved by irrefutable documentary evidence. There is in the Record (AB Ex. 2) a letter discharging Mr. Elliott written on Mayne's typewriter and on his water-marked stationery (of which he denied all knowledge) but which contains Richard's handwriting and which Richard was forced to admit that Mayne prepared at his request. (*Supra,* p. A20.)

The counterclaim did not charge, and there is no *direct* proof, that Goldsworthy was a party to this conspiracy.

12. The opinion states: (p. A3) ". . . **the appellant argues that a fiduciary relationship existed between the bank and the settlor, that the latter was in a senile condition and did not understand the trusts and that the Bank 'secured' the trusts through a presumed exercise of undue influence''.**

As we have shown, neither the appellant's pleadings nor any argument by appellant have ever charged the Bank or anyone with "undue influence". (*Supra,* pp. A13-14.) And this Court has several times declared that the words "undue influence" are inappropriate and confusing in this context. (*Supra,* p. A13.) The donor's senile condition was admitted by the Bank's own witnesses and proved by overwhelming evidence. (*Supra,* pp. A14-16.) The Record shows conclusively that the donor did not understand these trusts: She could not tell her daughter why the Bank was given complete discretion to withhold one half of the income from her daughter's trust. (Rec. 282.) She said she was "amazed" and did not know the trust was "that way" when her daughter

told her that she could not dispose of the corpus of her trust by her will as her mother had told her she could. (Rec. 284-5, 475-6.)

13. The opinion states: (p. A3) **"It is asserted that the settlor did not have independent advice in private, and the proposition is advanced that in order to avoid a finding of undue influence under the present circumstances it must be shown that the donor privately consulted a competent, independent adviser."**

Again we call attention to the fact that neither in our pleadings nor in our argument have we ever charged "undue influence" or advanced any "proposition" about avoiding a finding of undue influence. (*Supra,* pp. A13-14.) We have never sought "a finding of undue influence". We have called attention to the 66 decisions of this Court setting aside transfers to fiduciaries (34 of them reversing the lower court) on the ground that the fiduciary had not overcome the presumption of invalidity arising from such transfers. These cases hold that a fiduciary securing a conveyance to itself must by clear and convincing evidence remove every reasonable suspicion regarding it. (See our original Brief, p. 11.)

14. The opinion then states: (p. A3) **"We are aware of no rule of law which deems the transfer fraudulent whenever there has been no private consultation with an independent adviser."**

The decisions make it abundantly clear that a transfer to a fiduciary need not be "deemed fraudulent" in order to set it aside. See *Roby* v. *Colehour,* 1890, 135 Ill. 300, 329, "This prohibition operates irrespectively of the good faith or bad faith of such dealings"; *McDonnell* v. *Holden,* 1933,

352 Ill. 362, "This is true regardless of the existence of actual fraud, undue influence or coercion." *Commercial National Bank* v. *Kloth,* 1935, 360 Ill. 294, 306, "It is not essential that the appellants show fraud but under the foregoing and other authorities it is essential that good faith be shown by the appellees." *Kosakowski* v. *Bagdon,* 1938, 369 Ill. 252, 255, "We have often held that where a fiduciary relation exists and gives cause for suspicion, it is not necessary to prove actual fraud in order to vitiate a questioned action." *Schueler* v. *Blomstrand,* 1946, 394 Ill. 600, 613 "Actual and intentional fraud need not be established in order to set aside a deed where a fiduciary relation exists."

We cited in our original brief three cases where courts have set aside Irrevocable Trusts to banks because of the confidential or fiduciary relation and in each case have emphatically stated that they did not find that the bank had been guilty of fraud, misconduct or any improper action. *Harrison* v. *City National Bank of Clinton,* 1962, 210 Fed. Supp. 362; *Bullock* v. *Lloyds Bank,* Law Reports, 1955, 1 Ch. 317; *Beard* v. *Beard,* 1917, 173 Ky. 131, 190 S. W. 703.

In 19 cases this Court has set aside a transfer to a fiduciary because the donor had no competent, independent adviser. *Hofert* v. *Lattori,* 1961, 22 Ill. 2d 126, 132; *McFail* v. *Braden,* 1960, 19 Ill. 2d 108, 119-20; *Works* v. *McNeil,* 1953, 1 Ill. 2d 47, 52-3; *Curtis* v. *Fisher,* 1950, 406 Ill. 102, 109; *Dombrow* v. *Dombrow,* 1948, 401 Ill. 324, 333; *Krieg* v. *Felgner,* 1948, 400 Ill. 113, 122; *Clark* v. *Clark,* 1947, 398 Ill. 592, 604; *Davis* v. *Brickey,* 1947, 397 Ill. 556, 565; *Schueler* v. *Blomstrand,* 1946, 394 Ill. 600, 611; *Fisher* v. *Burgiel,* 1943, 382 Ill. 42, 53; *Seely* v. *Rowe,* 1939, 370 Ill. 336, 341; *Kosakowski* v. *Bagdon,* 1938, 369 Ill. 252, 257; *Rutherford* v. *Schneider,* 1923, 307 Ill. 28, 31; *Hensan* v. *Cooksey,* 1908,

237 Ill. 620, 626; *Fish* v. *Fish,* 1908, 235 Ill. 396, 404; *Gilmore* v. *Lee,* 1908, 237 Ill. 402, 412; *Thomas* v. *Whitney,* 1900, 186 Ill. 225, 231; *White* v. *Ross,* 1896, 160 Ill. 56, 71-2.

However, we have never argued that there must be such a competent, independent adviser to sustain every transfer to a fiduciary. The case of *Boryca* v. *Parry,* 1962, 24 Ill. 2d 320 cited in the opinion (pp. A3-4) seems to us far afield. In that case a mother and daughter went to a lawyer whom neither of them had ever met and requested him to prepare a deed from the mother to the daughter. This Court sustained the deed although the daughter was a technical fiduciary and was present when the attorney prepared the deed. This Court said: (p. 329) "Nowhere in the record does it appear that she [the mother] suffered from either mental or physical impediment which would affect her ability to know and comprehend the nature and effect of the documents she executed." The opposite is true in the case at bar.

The Bank admits that these Irrevocable Trusts would not be valid unless the donor had independent legal counsel (Rec. 1009) and claims that Goldsworthy qualifies under the decisions of this Court as the donor's competent, independent adviser in the creation of these trusts. It is clear, however, that Goldsworthy cannot fall within this Court's definition of a competent, independent adviser. In *Clark* v. *Clark,* 1947, 398 Ill. 592, 604, this Court rejected the contention that an attorney who had drawn a deed to a fiduciary satisfied the requirements of the law as a competent, independent adviser. This Court said that he had acted only as a scrivener. Goldsworthy admitted that he acted only as a "draftsman" of these Irrevocable Trusts. (Rec. 222.) He admitted that he knew nothing whatever about the donor's finances.

(Rec. 223-225.) He did not inquire and did not know that she had almost a zero tax base on the stocks that were put into these Irrevocable Trusts. That tax base would be frozen in the trust. Goldsworthy could not qualify as her competent, independent adviser. He was only the draftsman of this trust. (Rec. 222.)

Another decision of this Court (*Dombrow* v. *Dombrow*, 1948, 401 Ill. 324) also makes it clear that Goldsworthy cannot qualify as the donor's competent, independent adviser in this case. In that case this Court said "Without commenting at length on the role of the witness Schalk, *who was evidently inserted in the picture to make it appear that appellee had the benefit of independent advice,* we are of the opinion, from an analysis of his testimony, that he was scarcely such an informed and competent adviser, as would enable the fiduciary to meet the burden of proof." (p. 333.) (Emphasis supplied.) Goldsworthy testified that Mayne told him at the time that the Irrevocable Trust would not be valid unless Mrs. Meyer had independent legal counsel. (Rec. C 361.) Goldsworthy was brought in by the Bank to meet that legal requirement. Can a lawyer brought into the picture by a bank for that purpose be independent? This Court has held that he cannot be what the law contemplates as a competent, independent adviser. (*Dombrow* v. *Dombrow, supra.*) What chance would any lawyer brought into a situation such as this by a bank have to give independent advice to the donor? The bank brought him to draw the trust to it and he drew it. That is clearly not what the decisions of this Court contemplate as a competent, independent adviser.

Goldsworthy never saw Mrs. Meyer privately regarding these Irrevocable Trusts. He had only three short meet-

ings with her on the subject. Each time Mayne arranged the appointment and remained with Goldsworthy and Mrs. Meyer throughout. (Rec. 232-233.) What chance would a lawyer have to give independent advice under such circumstances? The law is clear that an independent adviser must see the donor privately. Five States, a Federal Court and an English Court have expressly so declared. (See our original brief, pp. 31-34.) This Court has never heretofore had occasion to lay down this requirement but in every case where it has sustained a transfer to a fiduciary because the donor had a competent, independent adviser, it has noted particularly that the adviser did see the donor privately and out of the presence of the fiduciary. (See 7 Illinois cases cited in our original brief, p. 34.)

The opinion in this case ignores entirely Goldsworthy's disqualifications as a competent, independent adviser. The Bank admitted of record that without such an adviser these trusts would not be valid. (Rec. 1009.) The opinion limits itself to the statement that the law does not require that the donor to a fiduciary have a private consultation with an independent adviser in all cases. (Opinion, p. A3.) That we admit. But 19 decisions of this Court have set aside transfers to fiduciaries because the donor had no competent, independent adviser. And the Bank here expressly admitted that these trusts would not be valid unless the donor had independent, legal counsel. (Rec. 1009.)

15. The opinion states: (p. A5) **". . . nor are the repeated references to the settlor as a 'senile donor' substantiated by the evidence. Her physical and mental condition described by some 28 witnesses, including her family**

physician, social friends, employees and fellow board members of the bank, and others was found adequate to enable her to understand the trusts, and such finding is amply sustained by the testimony.''

Under the law appellant was not required to ''substantiate'' her mother's senility. The burden was on the Bank as fiduciary to remove all reasonable doubt of it. And we suggest that the signed declaration by the Bank's own doctor witness, her family physician, made before any question in this case arose, ''Patient has been noted to become senile in the past several years'' (AB Ex. 72) and other documentary evidence (*supra,* pp. A14-16) cannot fail to leave a residue of doubt on that subject. The 28 witnesses consisted largely of employees and directors of the Bank. They testified to her legal competency and not to her non-impairment. Some of them admitted her mental impairment. (Rec. 575, 508, 1270, 1160.) None of them was able to give any foundation for his opinion by stating anything rational that she said or did after 1959. The law is well established that before a witness can testfy to a personal's mental condition he must state the facts showing the basis for his opinion. Opportunity for observation, standing alone is no such basis. Just as a witness to incapacity must state the facts showing irrational conduct as a basis for his opinion so the witness to rationality must state what the subject said or did that was rational (*Morecraft* v. *Felgenhauer,* 1931, 346 Ill. 415, 422.) Without that foundation an opinion has no weight whatever. (*Lloyd* v. *Rush,* 1916, 273 Ill. 489, 498.) None of these witnesses gave any such foundation for his opinion.

We submit that in justice to itself, to the banks of this State and to future generations of litigants, this Court should allow a rehearing of this case.

Respectfully submitted,

KING, ROBIN, GALE & PILLINGER,
ROBERT L. BURHANS,
Attorneys for Appellants.

WILLARD L. KING,
ROBERT L. BURHANS,
DOUGLASS PILLINGER,
J. WILLIAM BRAITHWAITE,
Of Counsel.

ORDER OF THE SUPREME COURT OF ILLINOIS, DATED MAY 27, 1969.

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX C.

MOTION PRESENTED, AFTER SERVICE ON JULY 1, 1969, TO JUSTICE DANIEL P. WARD ON JULY 8, 1969.

Now comes the Appellant by King, Robin, Gale & Pillinger and Robert L. Burhans, her attorneys, and moves the Court to recall its mandate in this case and reconsider its Order denying a rehearing herein, on the ground that the decision denies the Appellant due process of law as guaranteed to her by the Fourteenth Amendment to the Constitution of the United States, in accordance with the affidavit of Willard L. King and the Memorandum of Authorities hereto attached.

The opinion in this case is novel since no other Court in any State has ever before held that banks in securing irrevocable trusts from persons towards whom they are in a fiduciary position are exempt from the laws governing fiduciaries because their only gain is their fees. The rule laid down by this opinion will be of great advantage and profit to the banks of Illinois. It directly affects all banks in Illinois having trust powers as though they were parties to this suit.

As set forth in the attached affidavit, the Justice who wrote the opinion in this case and two other Justices of this Court were, at the date of said opinion, stockholders and directors of certain banks in this State having trust powers. Consciously or unconsciously, they were interested in the

outcome of the case. The decision in this case therefore denies Appellant due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. (See Memorandum hereto attached.)

In the alternative Appellant moves the Court to recall its mandate in this case pending the filing by Appellant of a petition for certiorari to the Supreme Court of the United States which Appellant will file in apt time.

KING, ROBIN, GALE & PILLINGER,
ROBERT L. BURHANS,
Attorneys for Appellant.

AFFIDAVIT.

STATE OF ILLINOIS
COUNTY OF COOK } ss.

Willard L. King, being first duly sworn, deposes and says:

That the Appellant's Petition for Rehearing in this case was denied by this Court on May 27, 1969 and the mandate of this Court issued on June 6, 1969 and the mandate of the Appellate Court issued on June 12, 1969.

That on June 10, 1969 a document was filed in this Court in the case of *People* v. *Isaacs*, No. 39797, charging that the Justice of this Court who wrote the opinion for the Court in that case had accepted a gift of 100 shares of stock, of the value of $2,000, of Civic Center Bank and Trust Company of Chicago.

The House of Representatives of the State of Illinois thereupon on June 12, 1969 adopted House Resolution 249 under which a bi-partisan committee of leading Representatives was appointed to investigate the charges aforesaid "and any other matters relating to judicial impropriety."

This Court thereupon on June 16, 1969 made an Order appointing a committee of distinguished lawyers to investigate the said charges "in so far as they relate to the integrity of the judgment entered by this Court" in the Isaacs case.

In the course of these developments, Appellant and her attorneys learned for the first time that on the date of the opinion herein:

1. Chief Justice Roy J. Solfisburg of this Court was a stockholder and director of St. Charles National Bank of St. Charles, Illinois, a bank having trust powers.

2. Justice Robert C. Underwood of this Court was a stockholder and director of First National Bank of Normal, Illinois, a bank having trust powers.

3. Justice Ray I. Klingbiel of this Court, who wrote the opinion in this case, was a stockholder and director of State Bank of East Moline, Illinois, a bank not having trust powers and he, or members of his immediate family, were stockholders in Civic Center Bank and Trust Company of Chicago, a bank having trust powers.

None of the foregoing facts were known to Appellant or her attorneys until after the appointment of the Committee of the Illinois House of Representatives as aforesaid.

WILLARD L. KING.

Subscribed and sworn to before me, a notary public, this 1st day of July, 1969.

EDITH K. ANDERSON,
Notary Public.

MEMORANDUM OF AUTHORITIES.

In re Murchison, 1955, 349 U. S. 133 involved the question of whether due process was violated where the Judge presiding at a contempt hearing had also served as a "one man grand jury" out of which the contempt charges arose. On certiorari the Supreme Court reversed the Supreme Court of Michigan. The Supreme Court of the United States said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio,* 273 U. S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U. S. 11, 14."

In *Tumey* v. *Ohio,* 1927, 273 U. S. 510, the Supreme Court reversed the Supreme Court of Ohio where the Mayor of

the village who tried the defendant for a minor offense received $12.00 in costs imposed by the judgment. In a unanimous decision by Chief Justice Taft, the Supreme Court said: "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided, is, of course, the general rule. (citing cases) Nice questions, however, often arise as to what the degree or nature of the interest must be."

The Court stated that at the common law ". . . it is very clear that the slightest pecuniary interest of any officer, judiciary or quasi judiciary, in the resolving of the subject matter which he was to decide rendered the decision voidable."

The Supreme Court held, however, that the pecuniary interest of the Mayor in this case "is not the only reason for holding that due process of law is denied to the defendant here." The Supreme Court pointed out that, since the village received a portion of the fine imposed, the trial before its Mayor was a denial of due process. "With his interest, as Mayor, in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?"

The Court concluded: "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law . . ."

In the case of *In re Honolulu Consol. Oil Co.*, 243 Fed. 349, the Circuit Court of Appeals for the 9th Circuit issued a mandamus to compel a District Court Judge to cer-

tify his disqualification to try a civil case against an oil company where the Judge (although not having any interest in the case then at bar) was a stockholder in another oil company against which the Government planned to file a similar suit. The Circuit Court based the decision upon *North Bloomfield G. M. Co.* v. *Keyser,* 58 Cal. 315, where it was held that a Judge was disqualified to try a case involving flooding of land on a river by the defendant's mining operations. The Judge in question had no interest in the land involved in the suit. However, he was the owner of land "equally affected by the mining operations complained of". The Court said:

> "It is an ancient maxim, and one founded in the most obvious principles of natural right, that no man ought to be a Judge in his own case . . . 'The Court ought not to be astute to discover,' said the Supreme Court of Michigan in *Stockwell* v. *Township Board of White Lake,* 22 Mich. 350, 'refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application. The immediate rights of litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.' "

KING, ROBIN, GALE & PILLINGER,
ROBERT L. BURHANS,
Attorneys for Appellant.

ORDER OF THE SUPREME COURT OF ILLINOIS DATED JULY 8, 1969.

On Motion of the Appellant to recall the mandate in this case and reconsider the order denying a rehearing herein or, in the alternative to recall the mandate pending the filing by Appellant of a Petition for Certiorari to the Supreme Court of the United States and on objections to said motions by the Appellees and upon the stipulation of the Appellees that no further steps will be taken under the mandate herein in the Circuit Court of Peoria County until the ruling of this court upon said motions, it is ORDERED that said motions and objections be taken under consideration by the entire Court.

DANIEL P. WARD.

ORDER OF THE SUPREME COURT OF ILLINOIS DATED JULY 17, 1969.

And now, on this day, the Court having duly considered the motion by Appellant to recall mandate and to reconsider the order denying petition for rehearing, or, in the alternative, to recall and stay the mandate pending disposition of petition for writ of certiorari in the Supreme Court of the United States, and being now fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the motion by appellant to recall mandate and to reconsider the order denying petition for rehearing be, and the same is, denied. It is further ordered that the part of the motion to recall and stay the mandate pending disposition for writ of certiorari in the Supreme Court of the United States be, and the same is, allowed.

SUPREME COURT, U. S.

OCT 16 1969

JOHN F. DAVIS, CLERK

No. 612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CLARESA F. ARMSTRONG BROWN, *Petitioner,*

v.

COMMERCIAL NATIONAL BANK OF PEORIA, as Trustee, *et al., Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
CONCLUSION	15
APPENDIX A: Opinion of the Circuit Court of the Tenth Judicial Circuit of Illinois	1a
APPENDIX B: Opinion of the Appellate Court (Third District) State of Illinois	10a
APPENDIX C: Opinion of the Supreme Court of Illinois	17a
APPENDIX D: Letter from the Clerk of the Supreme Court of Illinois Setting Forth Order of July 17, 1969	22a
APPENDIX E: 12 U.S.C.A. § 73	23a
APPENDIX F: Illinois Revised Statutes, 1967, Chapter 120, §§ 499, 557, 584, 585	24a

INDEX OF CITATIONS

CASES:

Central Savings Bank v. *Lake*, 1927, 201 Cal. 438, 257 P. 521, *cert. denied* (1927), 275 U.S. 571 ..... 12, 13

Commonwealth Coatings Corp. v. *Continental Casualty Co.*, 1968, 393 U.S. 145, 89 S. Ct. 337 9

Edelman v. *People of the State of California*, 1953, 344 U.S. 357, 73 S. Ct. 293 5

Goodspeed v. *Great Western Power Co. of California*, 1937, 19 Cal. App. 2d 435, 65 P. 2d 1342 ..... 13, 14

Grame v. *Mutual Assurance Society of Virginia*, 1885, 154 U.S. 676, 14 S. Ct. 1193 5

Page

In re Honolulu Consolidated Oil Co., 1917, 243 Fed. 348 ..... 10, 11, 12
In re Murchison, 1955, 349 U.S. 133, 75 S. Ct. 623 10
People v. 123 Punch Boards, 1956, 8 Ill. 2d 520, 134 N.E. 2d 763 5
Rose v. *City of Chicago*, 1942, 317 Ill. App. 1, 45 N.E. 2d 717 5
Simmerman v. *State of Nebraska*, 1885, 116 U.S. 54, 6 S. Ct. 333 6
Sobina v. *Busby*, 1965, 62 Ill. App. 2d 1, 210 N.E. 2d 769 5
State of Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 1930, 281 U.S. 313, 50 S. Ct. 326 6
Susquehanna Boom Co. v. *West Branch Boom Co.*, 1884, 110 U.S. 57, 3 S. Ct. 438 6
Tumey v. *Ohio*, 1927, 273 U.S. 510, 47 S. Ct. 437 10
Wandschneider v. *Wandschneider*, 1918, 282 Ill. 286, 118 N.E. 486 5

STATUTES:

Ill. Rev. Stat. 1967, ch. 110A, § 341(g) 5
Ill. Rev. Stat. 1967, ch. 120, §§ 499, 557, 584, 585 7
12 U.S.C.A. § 73 7
28 U.S.C.A. § 2101(c) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 612

CLARESA F. ARMSTRONG BROWN, *Petitioner,*

v.

COMMERCIAL NATIONAL BANK OF PEORIA, as Trustee, *et al., Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF FOR RESPONDENTS IN OPPOSITION

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of the Tenth Judicial Circuit of Illinois, entered October 24, 1966, is unreported but appears in the record of this case, pp. C 1204-C 1214, and is printed in Appendix A hereto, *infra,* pp. 1a-9a. The opinion of the Appellate Court (Third District), State of Illinois, which was affirmed

by the Supreme Court of Illinois in the above entitled case, is reported in 94 Ill. App. 2d 273, 237 N.E. 2d 507, and is printed in Appendix B hereto, *infra,* pp. 10a-16a. The opinion of the Supreme Court of Illinois is reported in 42 Ill. 2d 365, 247 N.E. 2d 894, and is printed in Appendix C hereto, *infra,* pp. 17a-21a. The order of the Supreme Court of Illinois, entered on July 17, 1969, which the Petitioner seeks to review is not publicly reported; but the letter from the Clerk of the Supreme Court of Illinois setting forth this order is reproduced in Appendix D hereto, *infra,* p. 22a.

JURISDICTION

The Supreme Court of the United States does not have jurisdiction in this case because the question presented was not raised in a timely fashion in the state courts.

QUESTION PRESENTED FOR REVIEW

Was there a denial of due process when three of seven justices of a state supreme court held corporate offices, disclosed as a matter of public record, in corporations which were neither parties to the litigation in question nor had any interest in the outcome of the case before them on appeal?

COUNTERSTATEMENT OF THE CASE

Petitioner's insistence, in her statement of the case (p. 3 of Petition), on misstating the trial court's findings of fact and emasculating the rule of law followed, notwithstanding the appellate court's and supreme court's affirmance in each instance, necessitates the following counterstatement of the case:

This case originated when the Respondent Bank filed its Complaint seeking approval of its accounts and its investment policy with respect to two irrevocable trusts made by Clara K. Meyer on January 15, 1962, one of which trusts was principally for the benefit of her daughter, Claresa, who is the Petitioner, and the other one of which was principally for the benefit of her son, Richard, who is one of the Respondents. The Petitioner then counterclaimed, seeking to set aside both trusts. As found by the trial court (App. 8a), the Bank's action grew out of a desire to have its investment policy with respect to Petitioner's trust, which had repeatedly been questioned by Petitioner, approved by the Court. The trial court further found that Petitioner's Counterclaim, seeking to set aside both trusts on grounds of undue influence on the part of the Bank, was filed only after she found she could not completely dominate the investment policy with respect to her trust (App. 7a). Petitioner also counterclaimed to set aside an irrevocable trust made by Clara K. Meyer on January 7, 1960, principally for the benefit of three of her four grandchildren, all four being children of her son, Richard. After considering over 2,000 pages of testimony and several hundred exhibits, the trial court, without making a special finding of evidentiary facts, expressed an opinion concerning the ultimate facts, to-wit: That Clara K. Meyer, the settlor, was neither incompetent nor in such a weakened mental condition that she could be easily influenced, nor was she in a subservient position to the officers and employees of the Bank or to her son and daughter at the time of the execution of the trusts (App. 3a); that the basic idea for both the 1960 and 1962 trusts was initiated by the settlor and not by the Bank or either of her two children (App. 7a); that the trusts were not

"procured" by the Bank out of self-interest (App. 7a); that under Illinois law the Bank was not a beneficiary in the transaction (App. 4a, 5a); that the settlor had capable and adequate independent counsel of her own choosing (App. 6a); and that, in all respects, the equities were with the Plaintiff and again the Counterclaimant (App. 9a). Petitioner appealed to the Appellate Court of the State of Illinois, Third District, which unanimously affirmed, in all respects, the trial court.

From the appellate court, Petitioner appealed to the Supreme Court of the State of Illinois, which unanimously affirmed the judgment of the appellate court, and specifically found the evidence *not* to support either Petitioner's claim that the settlor's attorney, Boyd Goldsworthy, was not independent counsel or that there existed a conspiracy between the settlor's son, Richard Meyer, Goldsworthy or Bank vice president Frank Mayne, to discontinue the retainer of Attorney John Elliott (App. 21a).

On the law, the trial court—contrary to Petitioner's bald assertion at p. 3 of her Petition—did not hold that the Bank was exempt from its fiduciary obligations because its only gain was its fees; rather, it merely followed established Illinois law to hold that the mere receipt of management fees did not create a presumption of fraud, unfairness or undue influence on the part of the fiduciary. On this point the trial court was affirmed by the appellate court (App. 15a) and the Illinois Supreme Court (App. 20a). Petitioner's Petition for Rehearing by the Illinois Supreme Court was denied on May 27, 1969.

Approximately six weeks later, Petitioner moved the Illinois Supreme Court to reconsider its order of May

27, denying Petition for Rehearing, alleging for the first time that since three justices of the supreme court were directors and stockholders of banks, she had been denied due process of law as guaranteed to her by the Fourteenth Amendment. The Illinois Supreme Court, with the three justices not participating, denied the motion, but allowed Petitioner's motion to recall and stay the mandate pending disposition of Petition for Writ of Certiorari in the Supreme Court of the United States (App. D).

REASONS FOR DENYING THE WRIT

1. The Supreme Court Should Deny the Petition for a Writ of Certiorari in This Case Because the Federal Question Was Not Raised in a Timely Manner in the State Court

It is well settled that failure seasonably to raise the federal question in accordance with the requirements of state law will preclude review by the United States Supreme Court. *Edelman* v. *People of the State of California,* 1953, 344 U.S. 357, 73 S. Ct. 293. Illinois law is clear that a party cannot for the first time on a petition for rehearing raise questions which were not urged or argued on appeal. *Wandschneider* v. *Wandschneider,* 1918, 282 Ill. 286, 118 N.E. 486; *Sobina* v. *Busby,* 1965, 62 Ill. App. 2d 1, 210 N.E. 2d 769; *Rose* v. *City of Chicago,* 1942, 317 Ill. App. 1, 45 N.E. 2d 717. Indeed, under Rule 341 of the Rules of the Supreme Court of the State of Illinois, new points cannot be raised even in reply briefs. *Ill. Rev. Stat.* 1967, ch. 110A, § 341(g); *People* v. *123 Punch Boards,* 1956, 8 Ill. 2d 520, 134 N.E. 2d 763. Stated another way, a petition for rehearing, filed in the state court after judgment, which has been denied is not a part of the record before the United States Supreme Court. *Grame* v. *Mutual Assurance Society of Virginia,* 1885,

154 U.S. 676, 14 S. Ct. 1193; *Simmerman* v. *State of Nebraska,* 1885, 116 U.S. 54, 6 S. Ct. 333. The court stated in *Susquehanna Boom Co.* v. *West Branch Boom Co.,* 1884, 110 U.S. 57, 3 S. Ct. 438, that:

> ". . . our jurisdiction extends only to a review of the judgment as it stands in the record. We act on the case as made to the Court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment on a petition for rehearing. Such a petition is no part of the record on which the judgment rests." (P. 59.)

The only exception to the rule that raising a federal question by petition for rehearing to the state appellate court comes too late is where the decision of that court has unexpectedly given rise to a federal question which the party seeking review has had no previous opportunity to assert and could not fairly have anticipated. *State of Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 1930, 281 U.S. 313, 50 S. Ct. 326.

Petitioner's failure to raise the issue of the extent to which the holdings of three justices of the Illinois Supreme Court in banks may have denied her due process of law when the justices decided a case involving a bank does not fit within this exception. As noted by Petitioner herself on p. 7 of her Petition, information as to who are stockholders or directors of banks is a matter of public record, and this would have been easily obtainable by Petitioner before prosecuting her appeal to the Illinois Supreme Court, thereby giving the justices in question an opportunity to consider disqualifying themselves. Not only did Petitioner utterly fail to raise the issue on her appeal, but she still had not apprised herself of information which was a matter

of public record when she filed her first Petition for Rehearing. Even the most casual investigation would have revealed, for example, that this information, in the case of directors, was on file in the Office of the Comptroller of the Currency (12 U.S.C.A. § 73, printed in pertinent part in Appendix E hereto), and also available in the *American Bank Directory,* which is published four times a year. In the case of shareholders, the information was also available as a matter of public record. *Ill. Rev. Stat.* 1967, ch. 120 §§ 499 and 557 (printed in pertinent part in Appendix F hereto) provide that shares in state and national banks are to be assessed and listed as personal property. Ch. 120 §§ 584, 585 (printed in pertinent part in Appendix F hereto) provided for the publication of the assessment lists which indicate, among other things, the names of the banks in which shares are owned and the assessed valuation of same. Having failed to raise the question in a timely fashion, Petitioner is now barred from pursuing the matter any further.

2. The Petition for a Writ of Certiorari Was Not Filed in a Timely Fashion

28 U.S.C.A. § 2101(c) provides that a writ of certiorari must be applied for within ninety days after the denial of a petition for rehearing in the court below. Thus, since the Illinois Supreme Court denied Petitioner's Petition for Rehearing on May 27, 1969, the last day on which she could file her Petition for a Writ of Certiorari was August 25, 1969. By waiting until September 18, 1969, to file, Petitioner's action is not timely.

3. Inasmuch as Petitioner's Belated Contention Has Been Considered by Four Justices, Whom Petitioner Accepts as Impartial, a Federal Question No Longer Exists

If it is found that the Petition has been filed in time, then such a finding recognizes implicitly that the relevant order of the Illinois Supreme Court denying her Petition for Rehearing is the order of July 17, 1969, instead of the order of May 27, 1969. Only by recognizing the order of July 17 as such can it be said that the Petition is timely, since Petitioner's ninety-day period would have begun to run from that day and her filing on September 18 would be within the ninety-day period. Therefore, the conclusion is inescapable that the merits of Petitioner's original claim in the circuit court of Peoria County, whose findings were upheld by the appellate court and Illinois Supreme Court, were again considered and rejected by the latter court—the last time being on July 17. The decision by the court on that date was made without the participation of the chief justice and two justices who owned shares in banks and were directors, a fact which Petitioner, presumably through inadvertence, fails to mention but which is made clear in the communication from the Clerk of the Illinois Supreme Court to counsel for the parties to the suit which is reproduced in Appendix D hereto. Thus, the merits of Petitioner's original claim were considered and rejected by the impartial court which Petitioner again seeks by requesting the United States Supreme Court to remand the case for consideration by only four justices. Inasmuch as Petitioner's belated contention has been considered by four justices, whom Petitioner accepts as impartial, a federal question no longer exists, if, in fact, there ever was one.

4. Petitioner Misstates the Holdings in Cases Which, Correctly Analyzed, Utterly Fail to Support Her Contention

In her Petition, Petitioner cites four cases in support of the contention that the three justices of the Illinois Supreme Court who owned bank stock and were directors were thereby disqualified to participate in deciding the appeal in this case. It should be restated for clarification that none of the justices owned any stock in, nor were they directors of, nor were they in any way connected with the Commercial National Bank of Peoria, the Respondent Bank. It is submitted that not only do the cases cited in her Petition bear no factual resemblance to the case at bar, but the law in each case does not support Petitioner's conclusions. In *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 1968, 393 U.S. 145, 89 S. Ct. 337, from which Petitioner has arranged a deceptive quotation by connecting isolated passages from some three pages of the opinion (p. 5 of Petition), Commonwealth Coatings Corporation, a subcontractor, sued the sureties on the prime contractor's bond to recover money alleged to be due for a painting job. The third arbitrator chosen pursuant to an agreement to arbitrate the controversy was a consulting engineer who had been retained by the prime contractor in the past. Although the court noted that there had been no dealings between them for about a year immediately preceding the arbitration:

> "Nevertheless, the prime contractor's patronage was repeated and significant, involving fees of about $12,000 over a period of four or five years, and the relationship went so far as to include the rendering of services on the *very projects involved in this lawsuit.*" (Emphasis added.) 393 U.S. 145, at 146.

Holding that, in the absence of disclosure to the subcontractor, the "close financial relations that had existed between [the third arbitrator and the prime contractor] for a period of years" (p. 148) gave rise to an appearance of bias, the court reversed and remanded.

Tumey v. *Ohio,* 1927, 273 U.S. 510, 475 S. Ct. 437, involved the constitutionality of an Ohio statute which provided for the trial by the mayor of a village of one accused of violating the Prohibition Act. Under the statute, the mayor's sole compensation as judge was paid by the defendant, if convicted. The court held that the direct dependence of the mayor upon convictions for compensation for his services was inconsistent with due process of law:

> "But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a *direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.*" (Emphasis added.) 273 U.S. 510, at 523.

The banks which the three justices are associated with were not and are not parties to this action, nor is it shown how these banks could in any way be affected by the outcome of these proceedings. Thus, the three justices herein had no direct, personal or substantial pecuniary interest in reaching a conclusion in this case.

Petitioner concedes that *In re Murchison,* 1955, 349 U.S. 133, 75 S. Ct. 623, bears no factual analogy to the case at bar, and then goes on to misstate *In re Honolulu Consolidated Oil Co.,* 1917, 243 Fed. 348,

to stand for the proposition that a judge must disqualify himself where he has no direct interest in the case then at bar, but owns stock in another corporation that "might be involved in similar litigation." (P. 6 of Petition.) That case involved an interpretation of Section 20 of the Judicial Code, which pertained to disqualificaton: ". . . whenever it appears that the judge of any District Court is in any way concerned in interest in any suit." The facts of the case were that the United States Government, as part of a unitary scheme or plan of litigation, had brought suit against various oil companies to recover possession of oil lands and obtain judgments for the value of oil or mineral extracted therefrom. One of the questions in each case was the rule of damages to be followed; and so far as the decision of this question was concerned, the cases were practically identical. Although the presiding judge had no direct interest in the case at bar, he was a former shareholder in another one of the defendant companies which had already been sued by the United States as part of the same plan. As a former shareholder, he could have been liable under a California statute even though he no longer held shares in the company at the time it was sued. Given the obvious interest of the district judge in arriving at a rule of damages in the case at bar which would minimize his potential shareholder's liability in the other case pending, the Court of Appeals for the 9th Circuit issued a writ of mandamus directing the judge to disqualify himself from hearing the case.

Petitioner, however, misapprehends the holding of *Honolulu Consolidated Oil* when she reads it to hold that a judge is disqualified from hearing a case when he has no direct interest in the case, but owns stock

in another corporation that "might" be involved in similar litigation. On Petitioner's view of the case, no judge who happened to own stock in a corporation could ever hear a case involving a corporate party in which he had no interest whatsoever, because of the possibility—irrespective of how remote it might be—that the judge's resolution of the legal issues therein could conceivably be relevant at another time and in another case, involving a corporate party in which the judge did own stock and for this reason disqualified himself. For example, under Petitioner's theory a judge who owns stock in any corporation could not decide a case involving a corporate party (in which he has no direct interest) which contests the constitutionality of a corporate income tax.

Correctly stated, *Honolulu Consolidated Oil* stands for the proposition that a judge must disqualify himself where two cases are pending, one against each of two corporate parties, and the judge's decision in the first case involving a corporate party in which he holds no direct interest will have a direct effect on the resolution of the issues in the second case involving a corporate party in which he is a shareholder. To state the holding otherwise, as Petitioner does on p. 6 of her Petition, bespeaks—at least—a total misunderstanding of the law in the case.

Arguments similar to Petitioner's have been made in two California cases; and the court in each instance rejected the claim of bias. In *Central Savings Bank* v. *Lake,* 1927, 201 Cal. 438, 257 P. 521, *cert. denied* (1927), 275 U.S. 571, the trial judge owned stock in a title insurance company which had insured title under terms of trust deeds similar to that which the judge was now asked to construe. The supreme court of

that state held the judge properly qualified to hear the cause where the title insurance company in which he owned stock was not a party and had not issued title insurance on the particular property involved. The defendants' arguments in that case sound very much like Petitioner's:

> "[T]he defendants contend that, if in the present proceeding it be declared that the said trust deed and the sale thereunder be unauthorized and void under the laws of this state, then such other trust deeds covering property, the title to which has been insured by said title company, would also be void and the said judge would suffer a loss in proportion to his stock interest by reason of the policies of title insurance heretofore issued on such other properties." 257 P. at pp. 523-524.

The court responded to this argument thusly:

> "The interest so alleged is so indirect, incidental, remote, and contingent as not to bear the slightest resemblance to the *direct, measurable, and pecuniary interest in the subject-matter of the action* required to be shown in order to disqualify the judge." (Emphasis added.) (P. 524.)

In *Goodspeed* v. *Great Western Power Co. of California,* 1937, 19 Cal. App. 2d 435, 65 P. 2d 1342, the question before the district court of appeals in California was whether a judge was properly qualified to hear a cause for alleged fraud in selling stock, in view of the judge's ownership of stock in banks which in turn owned stock similar to that allegedly fraudulently sold, where the banks were not a party to the action nor a member of the class which could intervene or which would directly profit by any judgment. The question was raised under a California statute which

required disqualification when the judge was interested as a holder of any capital stock of a corporate party, or when it appeared probable that, by reason of bias or prejudice of the judge, a fair and impartial trial cannot be had before him. Since the two banks were not members of a class which could intervene or would profit directly by the outcome within the meaning of the Civil Code, the court did not find an interest on the part of the judge sufficient to disqualify him:

> "Interest in law, as applied to a judge, had and must have a highly special and definite meaning. It means an interest direct, proximate, inherent in the instant event. It does not mean an interest in a similar suit against the same or other defendants; *it does not mean an interest in a point of law as such,* or in an issue of fact as such, or in any general or special phase of the case. It means a *definite, material, financial stake in the direct outcome of the particular case.*" (Emphasis added.) 65 P. 2d 1345.

To obfuscate further the issues in this case, Petitioner contends that the justices' alleged bias is evinced by the fact that the Supreme Court of the State of Illinois "established a novel rule of law" (P. 2 of Petition) "never before suggested by any court of last resort, that the bank was exempt from its fiduciary obligations because its only gain was its fees." (P. 3 of Petition.) In so doing, Petitioner inexcusably distorts the holdings of every court which has considered this case. As the opinions of the Trial Court, the Appellate Court of the State of Illinois, Third District, and Illinois Supreme Court make abundantly clear (App. pp. 4a, 14a, and 20a, respectively), the

rule of law followed was simply the established Illinois rule that the mere receipt of management fees does not create a presumption of fraud, unfairness or undue influence on the part of the fiduciary. Reading the holdings of these three courts, as Petitioner does, to mean that the "bank was exempt from its fiduciary obligations because its only gain was its fees", and then basing her argument to this Court on this misstatement of the holding, borders on the ludicrous.

Petitioner also conveniently ignores the continuing supervision of the trustee provided for in the Trial Court's opinion:

> "Finally, it is the opinion of the Court that the equities in this matter are, in all respects, with the Plaintiff and Counterdefendants and against the Counterclaimant. A decree should be prepared finding both the 1960 and the 1962 trusts valid and establishing the 1962 trusts under the supervision of the Court with reports to be prepared, filed and submitted to the Court for its approval annually, upon notice to the beneficiaries, until further Order of the Court." (App. 9a.)

CONCLUSION

While as suggested by Petitioner, the embarrassments which have befallen the judiciary in the past year are regrettable indeed, surely this situation can only be exacerbated by pious-sounding litigants who pretend to lament these embarrassments while at the same time opportunistically exploiting them by means of crass exaggeration, legal sophistry and misstatements of fact, to obtain a hearing in the United States Supreme Court.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Opinion of the Circuit Court of the Tenth Judicial Circuit of Illinois

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL
CIRCUIT OF ILLINOIS
PEORIA COUNTY
GENERAL DIVISION II

Case No. 64-E-3405

COMMERCIAL NATIONAL BANK OF PEORIA, *Plaintiff*,

v.

CLARESA F. ARMSTRONG BROWN, ET AL., *Defendant*,

and

CLARESA F. M. BROWN, *Cross Plaintiff*,

v.

COMMERCIAL NATIONAL BANK OF PEORIA, *Cross Defendant*.

Opinion

The Court having heard the testimony of witnesses examined under oath in open Court and, by stipulation of Counsel, having read evidence depositions of witnesses whose sworn testimony was taken prior to the trial and having received into evidence numerous written documents and exhibits and having given same full consideration without making a special finding of evidentiary facts, now expresses an opinion concerning the ultimate facts in issue in the above litigation.

It is the opinion of the Court that at the time of the execution of the 1960 Trust for the benefit of three of her grandchildren and the 1962 Trusts for her children and grandchildren Clara Kempshall Meyer was mentally competent and able to appreciate and understand the pro-

visions of each of the trust agreements. In support of this the Court has taken into consideration the settlor's background as a business woman, which extended over the bulk of her lifetime, her wide knowledge and experience in stocks and investments including business buildings, and her experience in dealing with trusts for her benefit with remainder to her children since 1946, the latter also having been amended in 1960, which amendment is not challenged. The settlor was not only capable, based upon her past experience, but was actively managing her business affairs in the purchase and sale of securities and was an active Director of the Central National Bank until its consolidation in the fall of 1961 when she retired from both a business life and bank directorship. Her mental capacity at the time of the execution of each of these trusts was completely supported by the testimony of witnesses produced who had known her in a business and personal way over a period of many years and also by the testimony of Frank C. Mayne, Jr., who was the only person present at the signing of both trusts who is now living, and the testimony of Boyd F. Goldsworthy, who was the only other person present in the preliminary conferences and at the signing of the 1962 trusts. Frank C. Mayne, Jr. also took part in the conferences leading up to the execution of each of the trusts. This testimony indicates that on those dates the settlor was capable of and did understand the nature and extent of her property, the natural objects of her bounty and the nature and terms of the trust instruments which she executed.

The Counterclaimant Claresa F. Armstrong Brown attempted to offset this testimony by circumstantial evidence, although stating throughout the piece that her mother was "competent" (capable of managing the ordinary affairs of life) but in a weakened condition on each of the dates in question. Although voluminous, this evidence may be grouped in about six areas, namely, medical reports and hospital records of arteriosclerosis and general physical

decline; systematic borrowing at the bank in lieu of liquidation of assets; placing $9,000 in Government bonds in the name of settlor with the right of survivorship to officers and employees of the bank; testimony of Claresa and several casual acquaintances of the decedent from Chicago that the settlor was failing in both mental and physical health in the fall of 1961; the occasional failure over the years to deposit dividend checks and improperly drawing personal checks with minor omissions; occasional forgetfulness of anniversary dates, the death of a son-in-law and other matters; and several idiosyncrasies.

It is the opinion of the Court that the testimony of the Counterclaimant does not sustain a position showing that the settlor was either incompetent or in such a weakened mental condition that she could be easily influenced or that she was in a subservient position to the officers and employees of the bank or to her son or daughter at the time of the execution of these trusts.

The second principal issue surrounds that of the acknowledged fiduciary relationship which existed between the Commercial National Bank of Peoria in the 1962 trusts and the Central National Bank of Peoria in the 1960 trust and the settlor and, also, between her son and daughter and the settlor at the time of the execution of these trusts. It has been the position of the Counterclaimant that because of the fiduciary relationship the trust could not be valid unless the settlor had independent legal counsel prior to and at the time of the signing of the trust agreements. Counterclaimant rules out this status on the part of John M. Elliott who had been on a personal retainer from settlor for many years because he was also on a retainer from the Trust Department of the Central National Bank in connection with the 1960 trust. It is also argued that Boyd F. Goldsworthy, who advised settlor and drafted the 1962 trusts, was equally disqualified as a shareholder of the Central National Bank and later the Commercial

National Bank of Peoria after the consolidation and because he had been and was the personal attorney for Richard Kempshall Meyer, Sr., son of the settlor.

In the opinion of the Court the law requires that where there is a fiduciary relationship and there is a conveyance to the fiduciary that there will be a presumption of fraud or undue influence, (1) if the fiduciary is a beneficiary in the transaction, and (2) it is shown that the fiduciary procured the transaction for its own benefit, and (3) that the grantor or settlor did not receive a full disclosure of facts and did not have independent advice. In the instant case there is a factual difference from the reported Illinois cases in that no advantage came to the fiduciary, here, except that it was named as trustee of an irrevocable trust and could anticipate the usual management fees for the lifetime of the primary beneficiaries, the children of the settlor. It is noteworthy that the trustee received no outright gift or grant and the trust instrument itself contained adequate control over the management, investment and ultimate vesting of the trust res. The case at bar is clearly distinguishable on its facts and the terms of the agreement from *Harrison* v. *City National Bank of Clinton, Iowa,* 210 Fed. Supp. 362, a district court case relied on by Counterclaimant.

Neither is it the type of circumstance where the trustee or fiduciary sought out a comparative stranger and convinced her to enter into a trust agreement. To the contrary, the record shows that the father of the settlor was an early President of the Central National Bank; that her mother inherited and passed along to settlor the largest single holding in the ownership of shares of that bank; that settlor's mother and later the settlor served as Directors of the bank, actively managing its affairs and that the settlor was, also, an inactive vice president of the bank until its merger with the Commercial National Bank in late 1961. The settlor used the bank as her headquarters

in a private business, that of investing securities. Her business prowess is evidenced by the fact that numerous witnesses testified in reviewing her portfolio that she had made excellent investments at the right time and is further evidenced by the fact that she managed to accumulate investments in excess of $5,000,000, which ultimately were scattered over four trusts and her probate estate at the time of her death. She knew almost every employee in the bank on a first name basis and they were at her beck and call. The 1960 trust was drawn with the cooperation of the trust officer (whom she, as a major stockholder, could apparently have had discharged had she so wished); with the cooperation of an attorney she had trusted and respected for several decades and who was on a substantial retainer from her and who was also on retainer from the Trust Department of her bank. The 1962 trusts were drawn by Boyd F. Goldsworthy with whom she had had a personal acquaintance over a period of at least 10 years and who had worked with her son Richard, her agent in the management of certain buildings which she owned in the City of Peoria. The element of gift, gain or unequal position on the part of the settlor and the trustee are absent as established by the greater weight of the evidence.

The relationship between the settlor and her son Richard Kempshall Meyer, Sr., and, indeed, with her daughter Claresa F. Armstrong Brown should also be examined in relation to these trusts to determine whether or not a fiduciary relationship existed and whether they as the direct or indirect beneficiaries, played any roll in obtaining these gifts in trust. The testimony is uncontradicted that neither of her children knew of the grandchildren's trust of 1960 until after it was executed. Richard first became aware of it when he was ready to send his older son to college a year or two after its creation and Claresa learned of it shortly thereafter from one of her nephews. A draft of the 1962 trust was given to each of the children prior

to its execution and they both examined it, reviewed it at length and discussed it in Claresa's apartment in early December 1961, about a month before its execution. At that time it had not been disclosed to them or either of them the nature or extent of the funds which would go into the trusts. No schedule of property was attached and the only reference to money was to the $50,000 gift to Claresa which could be withdrawn at once (if she desired to purchase an apartment). Neither of the children learned from the trustee or the scrivener anything about the nature and extent of the gift in trust until after it had been executed and copies were furnished to them for their advice. Both were amazed at the size of the gifts. Under these circumstances the evidence is conclusive that neither of the children did or could have influenced the settlor in the execution of the instruments or in the designation of the nature or extent of the funds to be placed in trust.

Assuming for the moment, however, that the trustee might be considered to be a beneficiary because of the management fees it could anticipate, it is the opinion of the Court that the settlor had capable and adequate independent legal counsel of her own choosing. Not only were John M. Elliott and Boyd F. Goldsworthy honest local attorneys, but both of them specialized in estate planning and enjoyed an excellent reputation in the community and among the members of their profession. It is apparent from the evidence that because of the age and physical infirmities of Mr. Elliott in 1961 and problems in handling Mrs. Meyer's Income Tax for the tax years 1957-1958 that she elected to obtain the services of Mr. Goldsworthy. It was not until after the January 1962 trusts were drawn in the fall of 1961 to be signed in January of 1962 and all of the conferences with Boyd F. Goldsworthy had been held that Mrs. Meyer reluctantly, upon receiving Mr. Elliott's statement for $600, decided to stop the annual retainer as a matter of economy. There is no evidence to support any conspiracy or plan on the part of Richard Kempshall

Meyer, Sr., Boyd F. Goldsworthy and/or Frank C. Mayne, Jr., to dismiss the services of John M. Elliott on any theory. It is noteworthy that, even though these men were capable in their field and recognized in the local area as experts in estate planning, their work was in part reviewed and verified by a firm of tax and estate planning specialists in Chicago.

It is further the opinion of the Court that the basic idea for both the 1960 and the 1962 trusts was initiated by Clara Kempshall Meyer and not by the trustee or either of the children and certainly not by any of the grandchildren and the trusts were not "procured" by the bank out of self-interest. The trusts were motivated by sound business and personal reasons and to meet present problems which then existed. The trusts were not made in anticipation of death and constituted good sound estate plans. At all times the bank, its officers, agents, and employees who had contact with Mrs. Meyer exercised toward her and exhibited the utmost good faith and made full disclosure of all facts available to them.

It is further the opinion of the Court that the Counterclaimant was aware indirectly or by hearsay of the grandchildren's 1960 trust at least two years before her mother passed away in February 1964. As co-executor she had available to her a copy of that trust shortly after her mother's death. She was aware of the 1962 trust for both her and her brother about a month before they were signed and participated actively in withdrawing $50,000 in funds from her 1962 trust to invest in an apartment in Chicago for her own use, withdrew an additional $1,000 in principal and collaborated frequently with the trustee concerning the nature and form of investment of the trust res and obtained a substantial change to increase her tax free income. It was not until she found she could not completely dominate the form of the investment of her 1962 trust and could not withdraw the principal for her

own use that a decision was made in 1965 to attempt to set aside the trust. She then tendered back her benefits if ordered by the final decree. She was aware of these facts at a time when she had full advice and collaboration of legal counsel and a private auditor of her own choosing. Her apparent and obvious motives, also, largely discredit much of her testimony. However, in light of the findings on the other issues which dispose of this case, it is unnecessary to enter a ruling in the affirmative defense, estoppel.

The trustee has made an accounting in the 1962 trust and has filed current reports, copies of which have been received by the beneficiaries. No testimony was presented in opposition to these reports, they have been examined by the Court and should be approved as filed.

As indicated above, the reason for the filing of the Complaint to establish the trusts in Court in the first instance was because of a difference of opinion between the trustee and the Counterclaimant concerning the investment policies followed by the bank. It is apparent from reading the trust instrument itself that the trust management and investment provisions are broad and that there is a strong retention clause concerning the Aetna Insurance Company stock which was originally the only item in the trust when created by the settlor. There was a sentimental as well as a practical reason for the long ownership and retention of Aetna stock in the Meyer family and, as frequently argued by Counterclaimant, it had an almost zero cost base in Claresa's trust. It has been a growth stock, the original cost being under $30,000 and the value at the time of the creation of the trust was approximately $540,000. There is always a divergence of interest between a life beneficiary and a remainderman, the life beneficiary desiring high income net yield investments without regard to the growth possibilities and the remainderman desiring high growth investments with little

regard to current dividends. The trustee has attempted to balance, through diversification of investments, both the growth and immediate income possibilities of this portfolio and has done so within the provisions of the trust instrument. In the opinion of the Court the investment policies as exercised by the bank should be approved.

Finally, it is the opinion of the Court that the equities in this matter are, in all respects, with the Plaintiff and the Counterdefendants and against the Counterclaimant. A decree should be prepared finding both the 1960 and the 1962 trusts valid and establishing the 1962 trusts under the supervision of the Court with reports to be prepared, filed and submitted to the Court for its approval annually, upon notice to the beneficiaries, until further Order of the Court.

The trustee is entitled to its usual and customary fees for the management of the trusts under its supervision and is also entitled, along with its attorney, to fees for extraordinary service in the defense of the Counterclaim in this law suit, said fees to be determined and assessed by the Court upon further hearing. Similarly, the Guardian ad Litem and Counsel for the Counterdefendants are entitled to reasonable fees to be determined and assessed by the Court upon further hearing.

Counsel for Plaintiff will prepare a decree accordingly.

/s/ ROBERT E. HUNT
Judge

APPENDIX B

Opinion of the Appellate Court (Third District)
State of Illinois

Case No. 67-16

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D. 1968

CLARESA F. ARMSTRONG BROWN, Defendant, Cross-Complainant, Counterclaimant, Appellant and Cross-Appellee,

v.

COMMERCIAL NATIONAL BANK OF PEORIA, a National Banking Association, as Trustee, etc., et al., Plaintiff, Cross-Defendants, Appellees and Cross-Appellants.

Appeal From the Circuit Court of the 10th Judicial Circuit of Illinois, Peoria County, General Division 11

Honorable Robert E. Hunt, Judge Presiding.

STOUDER, J.

This case, arising from the Circuit Court of Peoria County, involves the validity of three inter vivos irrevocable trusts created by Clara K. Meyer, now deceased.

The Settlor was a major stockholder and depositor with the Commercial National Bank of Peoria, had been on the board of directors prior to the consolidation which resulted in the establishment of Appellee Bank in its present form in 1961 and had engaged in many business dealings with the bank over a long period of time. In 1946, Clara Meyer created a revocable trust naming the bank as trustee which trust was in effect at the date of the Settlor's death but is not involved in this litigation. In 1960, the Settlor created an irrevocable trust, the Appellee bank being trustee, her grandchildren being the principal

beneficiaries and referred to herein as the grandchildrens' trust. Two other irrevocable trusts were created in January, 1962, designating the bank as trustee, her son Richard Meyer being the principal beneficiary of one trust, herein referred to as the Richard trust and her daughter, Claresa Armstrong Brown, being the principal beneficiary of the other trust, herein referred to as the Claresa trust. Securities from the 1946 revocable trust were transferred to the three irrevocable trusts. Clara Meyer, at the age of 87, died testate, February 19, 1964.

A disagreement between the bank and Claresa resulted in the commencement of this suit by the bank for approval of its accounts and investment policies. An order was entered from which no appeal has been taken and we are not concerned with such order in this appeal. Claresa Brown counter-claimed against the bank as trustee and the beneficiaries of the three irrevocable trusts seeking to set aside such trusts. The issues created by the counter-claim were determined by the court sitting without a jury and resulted in an order dismissing the counter-claim for want of equity. This appeal follows. The trial court also fixed and allowed trustee's fees and fees for the attorneys of the trustee and the beneficiaries allocating such costs against the principal of the three trusts involved. Although no question is raised concerning the reasonableness of the fees allowed, the bank as trustee and the beneficiaries have cross appealed questioning the propriety of assessing such fees against the principal of the trusts rather than against the income of Claresa Brown.

The allegations of the counter-claim are in substance that Clara Meyer was mentally and physically enfeebled by old age and cerebral arteriosclerosis; that a fiduciary relationship existed between the bank and Clara Meyer at the time the trust agreements were executed, the bank exercising a dominant influence with respect to Clara Meyer's enfeebled condition; that Clara Meyer did not

understand the trust agreements entered into; that she did not receive independent legal advice concerning such agreements and that the bank conspired with Richard Meyer to deprive Clara Meyer of independent legal advice. It should be noted that the counter-claim does not allege actual fraud or mistake.

The evidence, which is voluminous, was presented during hearings lasting nearly four weeks and relates primarily to two issues, the circumstances of the execution of the trust agreements and the mental and physical condition of Clara Meyer.

The Settlor was advised in legal matters up to and including the time of execution of the grandchildrens' trust in 1960 by one John M. Elliot, an attorney. However when the Claresa and Richard trusts were executed in 1962, the only attorney involved was a Boyd Goldsworthy. Mr. Goldsworthy had been Richard's attorney in other matters and the evidence is conflicting as to whether the Settlor requested to have Mr. Goldsworthy represent her or whether she indicated any desire to have other representation or exactly whom Mr. Goldsworthy did represent. It does appear that Goldsworthy conferred with Clara Meyer prior to the execution of the Richard and Claresa trusts although an officer of the bank was also present. It also appears that Goldsworthy submitted his bill for services to Clara Meyer which bill was paid. Furthermore it can be said that there is little evidence from which it can be inferred that with respect to the trust agreements, Goldsworthy represented anyone other than Clara Meyer. The evidence is also in dispute as to how thoroughly the Settlor understood the somewhat involved trust instruments.

Claresa was acquainted with the terms of the trust agreement, a copy of the Claresa trust was made available to her and her attorney and she took advantage of some of

the trust benefits both prior and subsequent to the death of the Settlor.

The mental capacity of the Settlor is also in dispute. Appellant makes no claim that the Settlor was mentally incompetent prior to 1963 but, as we understand her argument, that Settlor's mental ability was progressively impaired due to cerebral arteriosclerosis over a long period of time resulting in incompetency sometime in 1963 and death in February of 1964. The evidence also shows that the Settlor was a director of the bank until the 1961 consolidation, regularly attended meetings and conducted her own business affairs as well as some for her daughter until sometime in 1962 after the execution of the Claresa and Richard trusts.

While appellant alleges that Richard conspired with the bank to accomplish the execution of the trusts, the record does not factually support such allegation nor does appellant make further argument on this point.

In order that these trusts may be set aside it must be shown either that the Settlor was incompetent at the time they were executed or that a fiduciary relationship existed between the bank, or one of the beneficiaries, and the Settlor, that the person other than the Settlor was the dominant party and by unfair tactics induced the Settlor to enter into a transaction from which the dominant party appears to gain at the expense of the dependent party. Works v. McNeil, 1 Ill. 2d 47, 115 N.E. 2d 320, Turner v. Black, 19 Ill. 2d 296, 166 N.E. 2d 588 and Boryca v. Parry, 24 Ill. 2d 320, 181 N.E. 2d 124.

Appellant's facts concerning senility being a progressive attribute of human nature are most interesting or would be had there been considerably fewer of them. However this court is fully prepared to recognize the fact that senility accompanies life, that it is indeed progressive and, in fact begins with the onset of life and progresses until

life is terminated. Unfortunately Appellants' voluminous facts, figures, documents and charts failed to establish the Settlor's incompetence prior to 1963.

Appellant, herself a psychiatrist, makes no claim that the Settlor was legally incompetent at the time the trusts were executed but only that the mental ability of the Settlor had become so impaired by senility that she depended upon the bank for advice in business matters and could not understand the import of the trust agreements without independent, competent legal advice. This argument itself assumes that the Settlor was capable of understanding advice and counsel albeit from someone other than the bank. Accordingly we do not believe the trusts can be deemed invalid on account of the Settlor's incompetency.

This leaves us with the following argument for appellant. The relationship between the bank and the Settlor was a fiduciary relationship. The bank was the dominant party due to the mental impairment of the Settlor and that the bank induced the execution of the trust agreements for its own gain. Based on these propositions, appellant would have this court announce as a rule of law that in any case where a fiduciary relationship exists and the parties to the relationship enter into a business transaction, that transaction must be set aside unless the transaction be affirmatively shown to be fair by proof that the dependent party was represented by independent legal counsel. This we do not conceive to be the law of this state nor are we prepared to announce it as such in this case.

It is true that where a fiduciary relationship exists and a transaction is entered into whereby the dominant party appears to gain at the expense of the dependent party, the transaction will be deemed presumptively fraudulent and will be set aside unless the one in whom trust and confidence is reposed establishes its fairness by clear and

convincing proof. Clark v. Clark, 398 Ill. 592, 76 N.E. 2d 446 and Works v. McNeil, 1 Ill. 2d 47, 115 N.E. 2d 320. It is also true that one method of establishing the fairness of such a transaction would be to show that the dependent party was represented by independent legal counsel. However this is not to say that having established the existence of a fiduciary relationship the burden is then upon the dominant party to establish the fairness of any or all transactions between the parties to the relationship.

We are not disposed to quibble about the question of whether Appellee Bank, or any of its officers, by virtue of being a professional fiduciary in its capacity as trustee, thereby was a fiduciary in any other capacity since the bank has conceded the relationship. Having shown the relationship however, appellant's burden does not then shift to appellee for appellant must also affirmatively show that appellee was the dominant party and that it gained from the trust agreement at the expense of the Settlor. There is no evidence in the record from which it can be inferred that the bank received any gain or benefit other than the compensation for its services as a professional trustee. This cannot be the kind of gain contemplated by the above rule for to so hold would mean an invitation never to pay any professional fiduciary for his services since such payment would thereby render the transaction presumptively fraudulent. Nor can it even be inferred from the evidence that the trust agreements were disadvantageous to the Settlor. At best the trust agreements minimized her potential federal estate tax and any disadvantage accrued not to the Settlor but to the appellant. Accordingly we believe appellant has failed to establish facts warranting the application of the presumptive fraud rule applicable to fiduciary relationships and hence the trusts are not invalid for this reason.

This brings us to the cross-appeal of the bank and the trust beneficiaries not including Claresa Brown, in which

it is contended that the court erred in assessing other costs against the principal of the trusts. No question is raised concerning the allowability, reasonableness or allocation among the trusts involved. It is argued by the bank and beneficiaries that such fees should have been assessed against Claresa Brown or her income from the Claresa trust. The general rule is that expenses incident to the preservation of a trust or for the benefit thereof are properly chargeable against and reimbursable from the trust estate. Kerner v. Peterson, 368 Ill. 59, 12 N.E. 2d 884 and Patterson v. Northern Trust Company, 286 Ill. 564, 122 N.E. 55. Such rule does not condition the assessment of fees and costs dependent upon the outcome of the litigation and does not require that such fees and costs be assessed against the unsuccessful party. Although costs may be assessed against the unsuccessful party where it appears the claim asserted was groundless, vexatious or for the purpose of harassment, we believe the record demonstrates that a bona fide dispute existed and consequently we find no error in the trial court's assessment of fees and costs against the trust estates.

For the foregoing reasons the decrees of the Circuit Court of Peoria County are affirmed.

DECREES AFFIRMED.

ALLOY, P. J., and
SCHEINEMAN, J. concur.

APPENDIX C

Opinion of Supreme Court of Illinois

Docket No. 41515—Agenda 32—January, 1969.

CLARESA F. ARMSTRONG BROWN, Appellant,

v.

COMMERCIAL NATIONAL BANK OF PEORIA *et al.*, Appellees.

MR. JUSTICE KLINGBIEL delivered the opinion of the court:

The Commercial National Bank of Peoria, as trustee, filed a complaint in the circuit court of Peoria County seeking approval of its accounts and investment policy with respect to two irrevocable trusts established in 1962 by Clara K. Meyer, since deceased. A counterclaim was filed by her daughter, Claresa Armstrong Brown, the principal beneficiary under one of the trusts. The counterclaim seeks to set aside both trusts together with a third one made in 1960, on the ground of undue influence on the part of the bank. After extensive hearings a decree was entered dismissing the counterclaim and approving the trustee's reports. The decree was affirmed by the appellate court (94 Ill. App. 2d 373), and we have allowed the daughter's petition for leave to appeal from the appellate court's judgment. The sole question is whether the circuit court erred in refusing to set aside the trusts.

The settlor, 85 years of age when the 1962 trusts were set up, had been divorced from her husband in 1933 and never remarried. She had two children: Richard, born in 1909, and Claresa, the appellant, born in 1916. Richard had four children, while Claresa had none. The 1960 trust was set up primarily for the settlor's grandchildren, and the two 1962 trusts were created for Richard and Claresa respectively. Under Richard's trust he was to receive the income for life, with the corpus to be distributed on his death to his descendants. Claresa's trust provided for

one-half the income to be paid to her, and the remaining half to be paid her in the trustee's discretion, should she require it, with a power of appointment in her over any portions of the income accumulated. The corpus was payable after her death to her children if any and if none then to Richard's children. The trust also provided for a lump sum payment of $50,000 as Claresa should desire, and this sum in fact was paid to her shortly thereafter when she purchased a co-operative apartment in Chicago, where she resided.

The evidence shows the settlor to have been a capable woman in the management of business affairs, having long experience in dealing with her stocks and other investments. She was an active director of the Central National Bank until its consolidation with the appellee bank in 1961. For many years her legal matters were handled by Attorney John Elliott, who was paid an annual retainer. In 1959 she discussed with Frank Mayne, vice-president of the bank, the question of making gifts in trust and she told him she wanted to create a trust for her grandchildren. Several conferences followed in which her attorney Elliott participated, and on January 7, 1960, the trust was executed by the settlor in the presence of both Elliott and Mayne.

In the summer of 1961 the settlor discussed with Mayne the matter of gifts in trust to her son and daughter, and several alternative plans were prepared by the bank. At that time she decided to employ Attorney Boyd Goldsworthy who had long known the son Richard and had done legal work for him through the years to draw the trusts. The documents were completed by November and sent to the settlor to study them. She gave them to both Claresa and Richard to examine and discuss, and on January 15, 1962; some six months after they were first discussed, the settlor signed them, in the presence of Mayne and Goldsworthy. The settlor died February 19, 1964, of arteriosclerosis. The appellant had received benefits

from her trust for some two years after it was created but in April of 1963 began to question the bank's investment policy. Her demands for a change of investments became so insistent that on November 20, 1964, the bank filed its complaint herein to have its actions confirmed.

In support of her counterclaim to have the trusts set aside the appellant argues that a fiduciary relationship existed between the bank and the settlor, that the latter was in a senile condition and did not understand the trusts, and that the bank "secured" the trusts through a presumed exercise of undue influence. It is asserted that the settlor did not have independent advice in private, and the proposition is advanced that in order to avoid a finding of undue influence under the present circumstances it must be shown that the donor privately consulted a competent, independent adviser.

We are aware of no rule of law which deems the transfer fraudulent whenever there has been no private consultation with an independent adviser. Whether the settlor had independent legal advice is merely one of several factors which may be important in determining the fairness of a transfer. The correct rule, where a fiduciary relationship exists, is that a transfer will be deemed presumptively fraudulent when the dominant party has profited at the expense of the dependent party. (*Boryca* v. *Parry*, 24 Ill. 2d 320.) In such cases the fiduciary has the burden of proving the transaction was fair and did not proceed from undue influence. (*Turner* v. *Black*, 19 Ill. 2d 296.) And as we have heretofore pointed out "Important factors in determining whether a particular transaction is fair include a showing by the fiduciary: (1) that he made a free and frank disclosure of all the relevant information he had; (2) that the consideration was adequate; and, (3) that the principal had competent and independent advice before completing that transaction." *Works* v. *McNeil*, 1 Ill. 2d 47, 52.

In the case at bar it is undisputed that the only gain or benefit to be realized by the trustee is its fee for administering the trust, and the first question that arises is whether this kind of "benefit" is sufficient to give rise to the presumption. The law in this State is that under such circumstances there is no presumption. The mere fact than an attorney or confidential agent who writes the will is named executor and trustee, to be compensated as such, does not alone raise a legal presumption of undue influence. He must receive a substantial benefit as a legatee or beneficiary. (*Turner* v. *Black,* 19 Ill.2d 296; *Gilbert* v. *Oncale,* 371 Ill. 427.) In *Compher* v. *Browning,* 219 Ill. 429, the confidential agent of an aged testatrix drew her will, or procured it to be drawn, and was made an executor and trustee thereunder. It was held (219 Ill. at 438-439) that the rule under which undue influence is inferred from a confidential relation has no application where the fiduciary takes nothing under the will, but was merely to be compensated for his services as such. He is not to be regarded as taking beneficially within the meaning of the rule but only as accepting duties thereunder. Where the fiduciary is benefited by the transaction he has the burden of showing its fairness, but if he merely drafts the instruments and is to act as trustee, the presumption does not apply. The party seeking to set aside the instruments must prove by a preponderance of the evidence that it was in fact the result of undue influence. *Williams* v. *Ragland,* 307 Ill. 386.

This the appellant has failed to do. Her claim that the trusts were "procured" by the bank out of self-interest finds no support whatever, nor are the repeated references to the settlor as a "senile donor" substantiated by the evidence. Her physical and mental condition described by some 28 witnesses, including her family physician, social friends, employees and fellow board members of the bank, and others was found adequate to enable her to understand the trusts, and such finding is amply sustained by the testimony. It is not necessary that a person setting up a

trust be able to explain every technical term used in the instrument. *Pernod* v. *American Nat. Bank & Trust Co.* 8 Ill.2d 16, 21.

Other points which appellant seeks to make are also without merit. Despite counsel's urging to the contrary, there is little evidence from which it could be inferred that the attorney Goldsworthy represented anyone other than the settlor, who was billed for his services and paid the fee. And as the trial court expressly found, there is nothing to show that a conspiracy or plan existed on the part of the son, Goldsworthy and Mayne to cause the dismissal of Elliott as Mrs. Meyer's attorney.

There is no need to unduly extend this opinion by discussing evidence item by item, as the parties have largely done throughout almost 400 pages of brief and argument. It is clear on this record that the basic idea for these trusts was initiated by the settlor, not by the trustee, and she established them only after deliberation and study over an extended period of time. Moreover there is nothing whatever to indicate she subsequently expressed dissatisfaction with any of them.

The trial court heard the evidence in this case, embodied in over 2000 pages of testimony and several hundred exhibits, and its conclusions were unanimously sustained by the appellate court. It is a well-established rule, too familiar to need citations, that where a case is heard by the chancellor and the evidence is oral, entirely or in part, his decree will not be reversed unless it is against the manifest weight of the evidence, or unless there is clear and palpable error in some other respect. The trial court having heard and observed the witnesses is in a better position than is a court of review to decide what weight should be given their respective testimony.

The Third District Appellate Court was correct in affirming the decree, and its judgment will be affirmed accordingly.

Judgment affirmed.

APPENDIX D

Letter from Clerk of Supreme Court of Illinois Setting Forth Order of July 17, 1969

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
SPRINGFIELD
62706

July 17, 1969

COPY

Messrs. King, Robin,
Gale & Pillinger
Attorneys at Law
135 South LaSalle Street
Chicago, Illinois 60603

In re: Claresa F. Armstrong Brown, appellant,
vs. Commercial National Bank of Peoria,
etc., et al., appellees, No. 41515

Gentlemen:

The Supreme Court today made the following announcement concerning the above entitled cause:

"The motion by appellant to recall mandate and to reconsider the order denying petition for rehearing is denied. That part of the motion to recall and stay the mandate pending disposition of petition for writ of certiorari in the Supreme Court of the United States is allowed."

Chief Justice Roy J. Solfisburg, Jr., and Justices Ray I. Klingbiel and Robert C. Underwood took no part in the consideration of this motion.

We are today recalling the mandate from the Clerk of the Appellate Court, Third District.

Very truly yours,

JT:gn
Clerk of the Supreme Court
cc--Attys. Kavanagh, Scully, etc.
cc--Attys. Davis, Morgan & Witherell
cc--Atty. Harry B. Hoffman

APPENDIX E

12 U.S.C.A. § 73

§ 73. *Oath*

Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated, any of the provisions of this chapter, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this chapter, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. . . . The oath, subscribed by the director making it, and certified by the notary public or other officer, before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency and shall be filed and preserved in his office for a period of ten years.

APPENDIX F

Illinois Revised Statutes, 1967

Ch. 120, § 499. *Property subject to taxation.*] § 18. The property named in this section shall be assessed and taxed except so much thereof as may be, in this act, exempted: . . .

Third: The shares of capital stock of banks and banking companies doing business in this state.

Ch. 120 § 557. *Listing and valuing stock of State and National banks.*] § 76. The stockholders of every kind of incorporated bank located within this State, whether such bank has been organized under the banking law of this State, or of the United States, shall be assessed and taxed upon the value of their shares of stock therein, . . . Such shares shall be listed and assessed with regard to the ownership and value thereof as they existed on the first day of April annually, . . .

Ch. 120 § 584. *Publication in counties of less than 500,000—Fees.*] § 103. In counties containing less than 500,000 inhabitants, as soon as the county assessor, supervisor of assessments or board of assessors, as the case may be, has completed the assessment in the county or in the assessment district he or it shall, . . . publish for such county or assessment district a full and complete list of the assessment of real and personal property, by townships if the county be so organized. . . . Such publication shall be made on or before July 10, of that year in counties with less than 150,000 inhabitants and on or before August 10, of that year in counties with 150,000 or more but less than 500,000 inhabitants, and shall be printed in some public newspaper or newspapers published in said county; or shall be mailed to every person in that township, or in counties not under township organization, in that county paying taxes upon personal property: Provided, that in every township or assessment district in which there is published one or more newspapers of general circulation,

the list of such township shall be published in one of said newspapers. . . .

Ch. 120 § 585. *Publication in counties of 500,000 or more.*] § 104. In counties containing 500,000 or more inhabitants, the county assessor in each year shall publish the assessment of personal property in full as soon as such assessment has been completed in the manner as is provided in this Section. . . .

In such counties, or assessment districts therein, the publication of the assessments of personal property and real estate or the changes therein required in this Act to be published, shall be printed in some newspaper or newspapers of general circulation published in the county except that, in every township or incorporated town which has superseded a civil township, in which there is published one or more newpapers of general circulation, the assessment list of such townships shall be published in one of such newspapers and in cities of more than 500,000 population the assessment list of such city shall be published in one or more newspapers of general circulation located within such city.

SUPREME COURT, U. S.

OCT 27 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 612

CLARESA F. ARMSTRONG BROWN,
Petitioner,

vs.

COMMERCIAL NATIONAL BANK OF PEORIA,
AS TRUSTEE, ET AL.,
Respondents.

REPLY TO RESPONDENTS' BRIEF.

WILLARD L. KING,
135 South La Salle Street,
Chicago, Illinois 60603,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 612.

CLARESA F. ARMSTRONG BROWN,
Petitioner,

vs.

COMMERCIAL NATIONAL BANK OF PEORIA,
AS TRUSTEE, ET AL.,
Respondents.

REPLY TO RESPONDENTS' BRIEF.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents suddenly seem anxious to argue the merits of this case. So are we. But we realize that this is not the proper forum in which to do so.

THE JURISDICTION.

Respondents argue that the federal constitutional point was not raised in apt time. But, Petitioner raised it as soon as she knew it, and the Supreme Court of Illinois fully considered it and decided it. On learning of it, she at once filed a motion before a justice of the court to reconsider her petition for rehearing on the sole ground that she had been denied due process of law guaranteed to her

by the 14th Amendment. The justice, to whom petitioner presented her motion, entered an order that her motion be taken under consideration by the entire court. (Appendix to Petition for Certiorari, p. A. 37.) On request, briefs were filed by both sides and thereafter the Supreme Court of Illinois considered and denied Petitioner's motion. This Court has declared in a vast number of cases that it is an "elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a [state] court . . . when it appears that such question was actually considered and decided". *Manhattan Life Ins. Co.* v. *Cohen,* 1913, 234 U. S. 123, 134; *Nickey* v. *Mississippi,* 1933, 292 U. S. 393, 394; *North Carolina RR Co.* v. *Zachary,* 1913, 232 U. S. 248, 257; *Whitfield* v. *Ohio,* 1935, 297 U. S. 431, 435, 436; *Montana ex rel. Haire* v. *Rice,* 1906, 204 U. S. 291, 299; *Ill. Central RR Co.* v. *Kentucky,* 1910, 218 U. S. 551, 556.

Respondents admit (brief p. 8) that the Federal question was so considered and decided.

THE NATIONAL PROBLEM.

Respondents would ignore the fact that the Judicial Council of the United States has forbidden judges to serve as directors of private corporations; that the legislature of Illinois has made the same proscription; that despite these prohibitions certain judges throughout the country (as in this case) are still serving as directors of banks; that much litigation is now coming before the courts involving bank trusts, which have had an explosive growth in the past decade; and that only an opinion of this Court can end this improper practice in cases affecting banks. (Petition for Certiorari pp. 6-8.)

We suggest that this Court may never again have so good an opportunity as afforded by this case to declare that no judge should serve as a director of a private corpo-

ration. Should not this Court also anounce that every judge must immediately disqualify himself when he owns stock in a private corporation that might be directly affected by his decision? Should not this Court suggest that a most important burden resting on a judge is to be constantly alert to his possible disqualification? Should not this Court, so far as possible, give the lower courts warning and guidance on that subject?

CONCLUSION.

As the 9th Circuit Court of Appeals has noted: "The Court ought not to be astute to discover refined and subtle distinctions" to save a case from the maxim that no man ought to be a judge in his own case. "A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance." *In re Honolulu Consol. Oil Co.*, 243 Fed. 349.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED
DEC 29 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 612

CLARESA F. ARMSTRONG BROWN,
Petitioner,

vs.

COMMERCIAL NATIONAL BANK OF PEORIA,
AS TRUSTEE, ET AL.,
Respondents.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI.

WILLARD L. KING,
135 South La Salle Street,
Chicago, Illinois,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This case presents the question of whether due process of law is denied a litigant when five of the eleven Judges who decided the case in the state courts were directors of banks, one of them was Chairman of the Board of a bank, and the decision inaugurated a novel rule of law favorable to banks. This Court has declared that "A fair trial in a fair tribunal is a basic requirement of due process." (*In re Murchison;* 1955, 349 U. S. 133, 136)

Since this Court held the Petition for Certiorari under consideration for many weeks and, contemporaneously with

its denial, the Chief Justice of the United States appointed a committee of Judges to formulate rules of Judicial Ethics, we assume that there is some connection between these two events.

We would fail in our duty if we did not call this Court's attention to the demonstrated futility, on this problem, of such a committee. Six years ago the Judicial Conference of the United States, with the Chief Justice of the United States presiding, laid down the rule that no Judge "shall serve in the capacity of an officer, director or employee of a corporation organized for profit." That rule has not been complied with. It had no sanctions. Only a decision of this court in a proper case can end this improper practice. *Who's Who in America* indicates that at least one of the seven judges presently appointed by the Chief Justice of this Court as a Committeeman on Judicial Ethics has violated this rule of the Judicial Conference of 1963. The recent debates in the United States Senate disclosed another violation of that rule. Other violations could be enumerated. The denial of certiorari in this case can be considered by the new Committee on Judicial Ethics as an indication by this Court that it disagrees with the rule adopted in 1963 by the Judicial Conference of the United States.

The developments in Illinois since the filing of the petition herein are directly pertinent. In 1967 the Legislature of Illinois passed an Act forbidding any judge to serve "as an officer or director of any business corporation or other for profit corporation." (Ill. Rev. Stat. 1967, Ch. 37, Sec. 160.11) In 1969 certain Illinois Judges who were directors of banks made an all-out effort to repeal that law. (House Bill 1488 introduced by seven Representatives and Senate Bill 659 introduced by five Senators) Senate Bill 659 passed the Senate but was recalled by its sponsors and

tabled the day after the Illinois judicial scandal broke. (Vol. 22 Illinois Legislative Digest, 239, 924) That scandal resulted in the forced resignation of two justices of the Supreme Court of Illinois for accepting from litigants gifts of bank stock. Both of these judges were directors of banks. One of them had written the opinion in the case at bar.

On September 9, 1969, following these forced resignations, the Chief Justice of the Supreme Court of Illinois appointed a committee of the bar which was directed to report *as soon as practicable* on "standards regarding non-judicial activities of Judges." This Committee was appointed by a chief justice of the Supreme Court of Illinois who had been for many years, while serving on the court, Chairman of the Board of a bank and who is still serving as a director of that bank.

On November 26, 1969 the Supreme Court of Illinois handed down a decision holding that the Illinois law of 1967 forbidding judges to act as directors of for profit corporations was unconstitutional and void. The supreme court declared: "The General Assembly is now without authority to enact standards of judicial ethics." (*Cusack* v. *Howlett*, 1969, *Not yet reported*) It held that the General Assembly could not even investigate the conduct of Judges.

On December 4, 1969, the Committee, appointed by the Chief Justice of the Supreme Court of Illinois, filed its report. It stated: "The rule of law in a free society cannot long survive without public trust in the competence, integrity and impartiality of the judiciary. Public confidence has been shaken by recent events on the national and state level and *prompt* efforts must be exerted to restore and increase a deserved trust in the rule of law." [Emphasis supplied] The Committee recommended that the Supreme Court of Illinois adopt this rule: "A judge shall

not assume an active part in the management of any business or serve as an officer or director of any for profit corporation."

And so the wheel has come full circle.

Can the Committee on Judicial Ethics recently appointed by this Court recommend any other rule than that adopted by the Judicial Conference of the United States in 1963, which was recently applied in the Senate of the United States, and which has now been repeated by the General Assembly of Illinois and by the Judicial Ethics Committee appointed by the Supreme Court of Illinois? Any other report of this Court's Committee on Judicial Ethics would only enhance the crisis of public distrust in the courts. (And see *Chandler* v. *Judicial Council*, 1966, 382 U. S. 1003)

Why palter with this crisis?

What good is a rule if it can not be enforced?

Is a Committee a proper forum to rule on a constitutional question? Should a constitutional argument be heard *ex parte*?

Why should this Court refuse to hear argument on a case directly involving this crucial national issue?

Petitioner prays that this Court grant rehearing of its order denying certiorari in this case entered on December 8, 1969, vacate that order, grant the petition and review the judgment and opinion below.

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December 23, 1969.

Certificate of Counsel.

As counsel for the Petitioner I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in rule 58(2).

Willard L. King.